No. 02-299-CSX Title: Entergy Louisiana, Inc., Petitioner
v.
Louisiana Public Service Commission, et al.

Docketed: August 29, 2002 Court: Supreme Court of Louisiana

Entry	Date	Proceedings and Orders
	Aug 22 2002	Petition for writ of certiorari filed. (Response due September 28, 2002)
	Sep 30 2002	Brief of respondents Louisiana Public Service Commission, et al. in opposition filed.
	Oct 15 2002	Reply brief of petitioner Entergy Louisiana, Inc. filed.
	Oct 16 2002	DISTRIBUTED for Conference of November 1, 2002
	Nov 4 2002	The Solicitor General is invited to file a brief in this case expressing the views of the United States.
	Dec 23 2002	Brief amicus curiae of United States filed.
	Dec 31 2002	REDISTRIBUTED for Conference of January 17, 2003
	Jan 15 2003	Supplemental brief of respondents Louisiana Public Service Commission, et al. filed.
	Jan 17 2003	Petition GRANTED. The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, March 3, 2003. The brief of respondents is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Wednesday, April 2, 2003. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, April 21, 2003. Rule 29.2 does not apply. SET FOR ARGUMENT April 28, 2003. **********
	Mar 3 2003	Joint appendix filed.
	Mar 3 2003	Brief of petitioner Entergy Louisiana, Inc. filed.
	Mar 3 2003	Brief amicus curiae of Edison Electric Institute filed.
	Mar 3 2003	Brief amicus curiae of United States filed.
	Mar 13 2003	CIRCULATED.
	Mar 17 2003	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
	Apr 2 2003	Brief of respondents Louisiana Public Service Commission, et al. filed.
	Apr 18 2003	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
	Apr 21 2003	Reply brief of petitioner Entergy Louisiana, Inc. (TBP) filed.
	Apr 24 2003	Record filed.
	Apr 28 2003	ARGUED.

Supreme Court, U.S.
FILED

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No. 02-

IN THE

Supreme Court of the United States

ENTERGY LOUISIANA, INC.,

Petitioner,

v.

LOUISIANA PUBLIC SERVICE COMMISSION, *et al.*,

Respondents.

Petition for a Writ of Certiorari to the Supreme Court of Louisiana

PETITION FOR A WRIT OF CERTIORARI

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WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

209 pp

QUESTION PRESENTED

Whether *Mississippi Power & Light* v. *Mississippi ex rel. Moore*, 487 U.S. 354 (1988), and *Nantahala Power & Light Co.* v. *Thornburg*, 476 U.S. 953 (1986), require a state public utility commission to allow an electric utility member of a multi-state power system to recover, in retail rates, the costs allocated to it by a rate schedule of the Federal Energy Regulatory Commission ("FERC"), or whether the state commission has jurisdiction to decide that it was "imprudent" for such a utility to incur the costs allocated to it under a FERC rate schedule, thereby "trapping" such wholesale costs?

PARTIES TO THE PROCEEDING

In addition to the parties listed in the caption, the five Commissioners of the Louisiana Power Service Commision – Hon. C. Dale Sittig, the Hon. Jack "Jay" A. Blossman, Jr., the Hon. Irma Muse Dixon, the Hon. James M. Field, and the Hon. Don Owen – are Respondents in this proceeding and were Defendants below solely in their official capacities as members of the Commission.

Pursuant to Sup. Ct. R. 29.6, Petitioner Entergy Louisiana, Inc. is a wholly-owned subsidiary of Entergy Corporation. Entergy Corporation has no parent company. Old Mutual, the parent company of Barrow, Hanley, Mewhinney & Strauss, owns 11% of the stock of Entergy Corporation. Old Mutual is publicly traded on the London and Johannesburg stock exchanges.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

Entergy Louisiana, Inc. ("ELI") respectfully submits this petition for writ of certiorari to the Louisiana Supreme Court.

OPINIONS BELOW

The opinion of the Louisiana Supreme Court (Appendix ("App.") 1a-21a) is reported at 815 So. 2d 27 (La. 2002). The order of the Louisiana Supreme Court denying the petition for rehearing (App. 159a) is not reported. The opinion of the Nineteenth Judicial District Court for the Parish of East Baton Rouge (App. 22a-23a) is not reported. The order of the Louisiana Public Service Commission (App. 24a-84a), Order No. U-20925-G, is not reported, but is available at 1998 WL 1285300.

JURISDICTION

The opinion and judgment of the Louisiana Supreme Court were entered on April 3, 2002. App. 1a. On May 24, 2002, the Court denied petitioner's timely petition for rehearing. App. 159a. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The pertinent provisions of the Federal Constitution and the Federal Power Act, 16 U.S.C. §§ 791a-828c, are reprinted at App. 165a-175a.

STATEMENT OF THE CASE

In this case, a divided Louisiana Supreme Court affirmed a decision by the Louisiana Public Service Commission ("LPSC") barring a local electric utility (ELI) from

recovering in retail rates – and thus "trapping" – costs that ELI was required to incur under a Federal Energy Regulatory Commission ("FERC") rate schedule. By unlawfully determining the "prudence" of ELI's compliance with a FERC-approved rate schedule, the state court and the LPSC are exercising jurisdiction that Congress assigned exclusively to FERC. The LPSC took these actions after FERC denied the complaint it previously had filed challenging the very allocation of costs in issue and after the D.C. Circuit affirmed that FERC decision.

The Louisiana Supreme Court decision is thus squarely contrary to *Mississippi Power & Light Co.* v. *Mississippi ex rel. Moore*, 487 U.S. 354 (1988) ("*MP&L*") and *Nantahala Power & Light Co.* v. *Thornburg*, 476 U.S. 953 (1986) ("*Nantahala*"). It is similarly contrary to the decisions of numerous state supreme courts and to decisions of the federal courts of appeals for the District of Columbia, First, Fourth, and Eighth Circuits. The only decision that provides any support for the Louisiana Supreme Court's judgment is an earlier decision of the Fifth Circuit that this Court granted certiorari to review, but that was dismissed when the parties settled the case. *New Orleans Pub. Serv., Inc.* v. *Council of the City of New Orleans*, 911 F.2d 993 (5th Cir. 1990), *cert. dismissed*, 502 U.S. 937 (1991) ("*NOPSI*"). Both the decision below and the *NOPSI* decision are in clear and irreconcilable conflict with this Court's decisions. Yet those decisions have twice been misunderstood and misapplied. This Court's review is warranted to resolve the conflict.

Such review is important because the decision below not only undermines the integrity of the System Agreement governing an electric system providing service in Arkansas, Louisiana, Mississippi, and Texas, but also undermines the Congressional scheme for regulation of interstate power. The Federal Power Act directs FERC to "promote and encourage" "voluntary interconnection and coordination of facilities for the generation, transmission, and sale of electric energy" in

the interest of "assuring an abundant supply of electric energy throughout the United States with the greatest possible economy." 16 U.S.C. § 824a(a). Congress gave FERC this jurisdiction precisely to prevent parochial local interests from impeding the achievement of benefits available through the coordinated operations of multi-state electric systems. This Congressional scheme will be substantially undermined if states may review for themselves the prudence of costs and benefits allocated by FERC pursuant to multi-state agreements and bar recovery of FERC-allocated costs. The need for review here is heightened by the strategy employed by the LPSC, and evidenced in this case, of using its own proceedings to subvert FERC's jurisdiction in order to serve its own interests. In view of the ruling below and *NOPSI*, a decision from this Court on this issue is the only certain means of preventing Louisiana and other state utility commissions from creating the disruptions of interstate commerce that the Federal Power Act was enacted to prevent.

1. The Multi-state Entergy System and FERC Rate Schedules. This case arises in the same "integrated power pool" involved in *MP&L*, 487 U.S. at 357, and *NOPSI*.[1] Petitioner ELI is an electric public utility that operates in Louisiana. It is a subsidiary of, and wholly owned by, a public utility holding company, Entergy Corporation. Entergy also owns four other utility operating companies, Entergy Arkansas, Inc., Entergy Gulf States, Inc., Entergy Mississippi, Inc., and Entergy New Orleans, Inc. "The five operating companies plan, construct, and operate their collective electric generating and transmission facilities as a single, integrated system serving parts of Louisiana, Arkansas, Mississippi, and Texas." App. 3a.

The current Entergy System Agreement, adopted in 1982 and subsequently amended, governs arrangements among the

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[1] Entergy Corporation was formerly Middle South Utilities, Inc. App. 4a n.3.

operating companies for the transmission, sale, and exchange of energy. Its purpose is:

> "to provide the contractual basis for the continued planning, construction, and operation of the electric generation, transmission and other facilities of the [operating companies] [and to] provide[] a basis for equalizing among the companies any imbalance of costs associated with the construction, ownership and operation of such facilities as are used for the mutual benefit of all the [operating companies]." [App. 3a-4a.]

The System Agreement is administered by a system-wide operating committee, the Entergy Operating Committee. The System Agreement is a rate schedule filed with and approved by FERC; any changes to the Agreement must be approved by FERC. See *Louisiana Pub. Serv. Comm'n.* v. *FERC*, 174 F.3d 218 (D.C. Cir. 1999) ("*LPSC*").

The System Agreement includes rate schedules that allocate resources and associated costs among the five operating companies and that are known as Service Schedules. These schedules are "formula" rate schedules in that they do not specify particular rates or cost allocations. Rather, they set forth formulas that prescribe how the allocations are to be calculated or determined and that delegate the application of certain aspects of the formula to the Entergy Operating Committee, subject to review by FERC in the event of claims that the formula had been misapplied. Once a Service Schedule is approved by FERC, it becomes part of the System Agreement.

One such service schedule – Schedule MSS-1, Reserve Equalization – is the subject of this case.[2] MSS-1 establishes a mechanism for equalizing generating reserves among the

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[2] "MSS" refers to the former name of the System's service company, Middle South Services, Inc. The number "1" indicates only that this is one of several Service Schedules. App. 4a n.3.

operating companies. Under MSS-1, each operating company bears responsibility for a share of the total Entergy system capability; that share is a function of the company's contribution to the System's peak load. Companies providing less than their calculated share of the System's capability make payments to companies providing more than their share. "Each of the operating companies makes or receives payments based on whether its capacity exceeds, equals, or is less than the system capability for which it is responsible." App. 5a. See also *LPSC*, 174 F.3d at 220 (characterizing MSS-1 as "the inter-company formula tariff that [FERC] administers to equalize costs among [the five Entergy operating companies]").

A generating unit must be "available" for use by the System, as defined in Section 10.02 of the System Agreement, in order to be counted as part of an operating company's capability in the calculation of MSS-1 payments.

During the mid-1980's, the Entergy operating companies had excess generating capacity. They implemented the Extended Reserve Shutdown ("ERS") Program, "to save money (for the customers, as well as for the companies themselves) by placing the excess generating units in an inactive, *i.e.*, extended reserve status." App. 6a. The System kept 24 units in ERS status in order to retain the capability to meet any future increase in power demand, yet "were able to reduce operating staff and maintenance costs and defer costs of repairing the units." *Id.*

The Entergy Operating Committee decided that units in ERS status should be considered "available" for purposes of calculating individual operating companies' capacity under MSS-1. As a result, ELI made higher MSS-1 payments than it would have made if none of the ERS units had been included in the MSS-1 computation.

2. The FERC ERS Proceedings. In 1993, FERC reviewed the System Agreement and initiated proceedings to

determine, inter alia, whether Entergy had violated the Agreement by including the ERS units in the MSS-1 computations. The LPSC intervened in that FERC proceeding, filing a separate complaint alleging that Entergy had violated the System Agreement by treating the ERS units as "available" capacity and seeking retroactive refunds for ELI's LPSC-jurisdictional customers, plus accrued interest.

A FERC Administrative Law Judge ("ALJ") concluded that, although the end result was just, reasonable, and not unduly discriminatory, the ERS units were not "available" for purposes of MSS-1 calculations within the meaning of Section 10.02 of the System Agreement, as then defined,[3] and therefore concluded that Entergy had violated the System Agreement. He rejected, however, the LPSC's request for refunds based on several considerations, including the substantial savings for ratepayers generated by the ERS program and his conclusion that the end result was just, reasonable, and nondiscriminatory. He also determined that the System Agreement should be amended going forward to allow ERS program units to be deemed "available" in the future. App. 124a-125a, 139a-140a, 151a-152a.

FERC affirmed that decision, including the ALJ's rejection of the LPSC's request for a refund of alleged overpayments. In so doing, FERC explained that Entergy's ERS program had provided significant benefits and overall cost-savings for the

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[3] Prior to August 5, 1997, section 10.02 of the System Agreement provided in pertinent part:

> "A unit is considered available to the extent the capability can be demonstrated and (1) is under the control of the System Operator, or (2) is down for maintenance or nuclear refueling. A unit is considered unavailable if in the judgment of the Operating Committee it is of insufficient value in supplying system loads because of (1) obsolescence, (2) physical condition, (3) reliability, (4) operating cost, (5) start-up time required, or (6) lack of due diligence in effecting repairs or nuclear refueling in the event of a scheduled or unscheduled outage." [App. 112a.]

system and that it was "just" and "reasonable" for Entergy to include ERS units in the MSS-1 calculation:

> By including ERS units in the Schedule MSS-1 computation, Entergy continued the previously-approved equalization approach that was established for excess capacity on the Entergy System. Moreover, if Entergy had not undertaken to reduce costs for its system by implementing the ERS program, these units would have been eligible for inclusion in Schedule MSS-1. *We do not believe that the Operating Companies should lose the right to have their costs equalized when they take advantage of the ERS program which, we note, provides very significant benefits for the Entergy system.*
>
> . . . .
>
> . . . By exercising our discretion not to order refunds, we are simply acting consistent with the equities in this case. Indeed, the record evidence demonstrates that, although Entergy acted in a manner inconsistent with Schedule MSS-1, *the end result was just, reasonable, and not unduly discriminatory*. App. 102a-103a (emphases supplied) (footnotes omitted).]

FERC therefore approved a proposed amendment to the System Agreement, effective August 5, 1997, which authorized the Entergy Operating Committee to consider ERS units "available" in MSS-1 calculations if the "'intent of [the Operating Committee is to] return[] the unit to service at a future date in order to meet Entergy System requirements.'" App. 104a (emphasis omitted). FERC further required that the:

> "Operating Committee's decision to consider an ERS unit to be available to meet future System requirements shall be evidenced in the minutes of the Operating Committee and shall be based on consideration of current and future resource needs, the projected length of time the unit would be in ERS status, the projected cost

> of maintaining such unit, and the projected cost of returning the unit to service." [*Id.* (emphasis omitted)].

In making this decision, FERC rejected both the argument of the LPSC that refunds should be allowed for past periods and the argument of the LPSC that the ERS units should be excluded from MSS-1 payment calculations in the future. FERC also denied the LPSC's request for rehearing. App. 160a-164a.

The LPSC pursued its arguments on appeal, but its contentions were rejected by the Court of Appeals for the D.C. Circuit. See *LPSC*, 174 F.3d at 231. In addition to holding that FERC's denial of refunds was lawful, the court of appeals rejected the LPSC's challenge to the amendment to Section 10.02, authorizing inclusion of ERS units in MSS-1 calculations if the Operating Committee intends to return the units to service in the future. The court of appeals held that the amendment was just and reasonable and, if necessary, that "discriminatory implementation of the amendment could be remedied in a proceeding under [Federal Power Act] § 206, 16 U.S.C. § 824e." *Id.*

Following FERC's amendment of the System Agreement, the Operating Committee determined that the ERS units should be considered "available" within the meaning of the amended definition. Based on the presentation of the Director of Resource Planning for Entergy, the Committee concluded that the ERS units were "available" within the meaning of that amendment. Neither the LPSC nor any other party challenged this determination before FERC. Therefore, after August 5, 1997, the ERS units were included in the MSS-1 calculations pursuant to the amended MSS-1 that had been approved by FERC. The reasonableness of this determination was verified by subsequent events for it is undisputed that, consistent with the Operating Committee's assessment, "[b]y 1999, all of the ERS units, with the exception of one, had either been returned to active service, or w[ere] scheduled for return to service." App. 6a n.4.

3. The LPSC Proceedings. During all relevant times, ELI annually filed with the LPSC financial data for the previous year relating to its cost of providing service. The LPSC uses these data to adjust ELI's retail rates. ELI's 1997 filing was based upon data from 1996 and included its MSS-1 payments made during 1996. All of the generating units in ERS status were treated as "available."

The LPSC ordered ELI to remove from its calculations "all MSS-1 overpayments incurred on or after August 6, 1997" that resulted from the inclusion of the ERS units in the MSS-1 calculation. App. 83a. It further ordered ELI to credit the overpayments "back to the ratepayers." *Id.*

The LPSC concluded that Entergy's treatment of ERS units benefited Entergy Arkansas (formerly Arkansas Power & Light Company) and Entergy New Orleans (formerly New Orleans Public Service, Inc.) and penalized ELI and Entergy Mississippi (formerly Mississippi Power & Light Company). The LPSC recognized that under the filed-rate doctrine, state regulators may not challenge FERC-approved wholesale rates and "trap" wholesale costs incurred by a utility. Nonetheless, the LPSC held that the *Pike County* exception applied in this case. Under that exception, a state may review the prudence of a utility's decision to purchase power at a FERC-approved rate if and only if the utility has the right to refuse to purchase that power. *MP&L*, 487 U.S. at 373-74; *Nanatahala*, 476 U.S. at 972 (discussing *Pike County Light & Power Co.* v. *Pennsylvania Public Utility Comm'n*, 465 A.2d 735, 737-38 (Pa. 1983)). The LPSC stated that:

> though FERC has exclusive jurisdiction over the issue of whether the System Agreement has been violated, there currently exists no FERC order that has found that the Operating Committee's decision is in compliance with the System Agreement. In the absence of such FERC determination, the Commission can scrutinize the prudence of the Operating Committee's decision without

violating the Supremacy Clause insofar as that decision affects retail rates. [App. 65a.]

The LPSC then determined that ELI did not consider the effect of the System's treatment of ERS units on its retail rates in Louisiana after August 5, 1997, and that the company failed to minimize its operating costs by continuing such treatment. App. 73a-74a. Moreover, the LPSC stated that ELI's duty to avoid imprudent costs includes the duty to follow the criteria set in the System Agreement to determine the available status of ERS units after August 5, 1997. It found that the Operating Committee's decision was made without complete or accurate information regarding the costs of returning ERS units to service and without ascertaining "'current and future resource needs, the projected length of time the unit would be in ERS status, [the] projected cost of maintaining such unit, and the projected cost of returning the unit to service'" under the amended System Agreement. *Id.* at 74a. Thus, the LPSC concluded that ELI knew or should have known that the MSS-1 payments made after August 5, 1997 were unreasonable at the time the payments were made and that it was imprudent for ELI to pay them even though the System had determined that they were due. The decision prevented ELI from recovering these costs from retail customers and thus trapped these costs.

ELI's arguments that the LPSC's review of the MSS-1 Service Schedule is preempted were rejected. The LPSC agreed that it lacked authority to review the reasonableness of ELI's 1996 MSS-1 payments, which are the MSS-1 payments that were included in the test year data that were under consideration in the case below. App. 64a. The LPSC further agreed that it lacked authority to order refunds of those payments in light of FERC's express refusal to order such refunds. *Id.* But the LPSC reasoned that FERC had not considered whether the Operating Committee's decision to use the ERS units in its calculations after August 5, 1997 complied with the amended System Agreement. Rather than

challenge the Operating Committee's decision at FERC, as it had done previously, the LPSC concluded that it had "the authority to assess the prudence of ELI's decision to continue to accord MSS-1 treatment to ERS units subsequent to the FERC Order No. 415 dated August 5, 1997." App. 69a-72a (emphasis omitted).

4. The Louisiana Supreme Court's Decision. ELI filed a petition for judicial review of the LPSC order on February 17, 1999. The district court, however, affirmed the order, stating that the ruling was "well within [the LPSC's] constitutional and statutory authority," and was neither arbitrary nor capricious. App. 22a. ELI appealed to the Louisiana Supreme Court.

In an opinion without citation to *MP&L*, the Louisiana Supreme Court affirmed the district court's decision. It recited the LPSC's two reasons for rejecting preemption: (1) that FERC had not expressly ruled that the Entergy Operating Committee's decision to include ERS units after August 5, 1997 complied with the System Agreement; and (2) that under *Pike County*, the LPSC had jurisdiction to review the prudence of the decision to continue to include ERS units in MSS-1 Service Schedule of the System Agreement after August 5, 1997, even though the LPSC concededly lacked jurisdiction to review the allocation of interstate wholesale costs under that same Agreement. App. 14a-15a. The Louisiana Supreme Court essentially adopted this reasoning.

First, relying on *Pike County* and *NOPSI*, the state court held that the LPSC was "not attempting to regulate interstate wholesale rates" and had not "challenged the validity of the FERC's declination to order refunds of amounts paid in violation of the System Agreement prior to the amendment." App. 19a. Instead, the court held, "the LPSC has merely examined the prudence of ELI's failure to make steps to minimize its MSS-1 payments after the effective date of the amendment to Section 10.02 of the System Agreement." *Id.*

Second, the Louisiana Court agreed with the LPSC that "the FERC's determination encompassed treatment of the ERS units *prior to* the effective date of the amendment" and that "FERC never ruled on the issue of whether ELI's decision to continue to include the ERS units is a prudent one [or] whether ELI must continue to make overpayments to the other Entergy operating companies." App. 19a.

For both of these reasons, the Louisiana Supreme Court affirmed the LPSC's decision that its review of the decision to include the ERS units in MSS-1, a FERC rate schedule, was not preempted. App. 20a.

Justices Kimball, Lobrano, and Traylor dissented. Justice Kimball's dissent pointed out that the majority had acknowledged that (i) the System Agreement is a FERC rate schedule, (ii) that FERC amended the System Agreement to state that ERS units may be included in calculations for MSS-1 payments if a specified condition is met, and (iii) that "FERC has exclusive jurisdiction over the issue of whether ELI has violated the System Agreement." App. 21a. She stated that the LPSC found ELI's decision to continue to include ERS units after August 5, 1997 imprudent, "because the LPSC found that ELI did not meet the conditions imposed in the amended System Agreement." *Id.* Thus, Justice Kimball concluded, "the LPSC is simply trying to do indirectly what it may not do directly, namely, determine that ELI violated a FERC tariff." *Id.*

REASONS FOR GRANTING THE PETITION

This case presents a recurring question under the Federal Power Act that has been decided in sharp conflict with this Court's prior decisions and those of all other courts, with the exception of the United States Court of Appeals for the Fifth Circuit. The Louisiana Supreme Court established a broad exception to FERC's exclusive jurisdiction over wholesale rates of electricity under the Federal Power Act. It held that

until FERC holds otherwise, states have jurisdiction to determine whether a FERC rate schedule has been violated, and more specifically, to determine whether a utility that is part of an integrated, multi-state power system is imprudent for failing to "minimize" the costs incurred under a rate schedule approved by FERC. App. 20a.

Under this holding, each state served by a multi-state utility system may do what this Court held to be preempted in *MP&L* and *Nantahala* – effectively re-litigate FERC-approved rates and cost allocations and "trap" FERC-mandated costs – subject only to state court review. Other states in the Entergy system and in other multi-state power systems may be forced to follow suit to protect the interests of their consumers. The result will be a patchwork of parochial rulings that is the antithesis of what Congress intended in enacting the Federal Power Act. This decision is worthy of the Court's review because it conflicts with decisions of this Court, is the subject of a conflict in the lower courts, and is critically important to the administration of the federal statute governing regulation of the electric power industry.

I. THE DECISION BELOW CONFLICTS WITH *MP&L*, *NANTAHALA*, AND OTHER DECISIONS OF THIS COURT, THE LOWER COURTS, AND FERC.

Bulk power arrangements among utilities are "particularly likely to affect more than one State, " and "uncontrolled [state] regulation" of utilities in multi-state systems can "patently interfere with broader national interests." *Arkansas Elec. Co-op. Corp.* v. *Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 377 (1983). In the Federal Power Act, accordingly, Congress established FERC as a single, neutral forum to assure that wholesale rates and contracts affecting such rates are "just, reasonable, and nondiscriminatory," and to balance the interests of shareholders and ratepayers in setting wholesale rates and allocating the prudent wholesale costs

among utilities serving different states.[4] See 16 U.S.C. §§ 824d, 824e; *FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591, 603 (1944). State regulation – which would impair interstate commerce by allowing the litigation and re-litigation of the reasonableness of wholesale power rates and interstate cost allocations in multiple state forums – is forbidden. *Arkansas Elec. Co-op. Corp.*, 461 U.S. at 377. The Act protects local interests by giving states and municipalities rights to participate in FERC proceedings and to file complaints with FERC. 16 U.S.C. §§ 824d, 824e, 825e.

"It is common ground that if FERC has jurisdiction over a subject, the States cannot have jurisdiction over that subject." *MP&L*, 487 U.S. at 377 (Scalia, J., concurring). This Court has construed the Federal Power Act to give FERC "plenary jurisdiction" to make all determinations required to regulate wholesale rates and to allocate costs among affiliated utilities, regardless of the "impact" on state regulation. See *FPC* v. *Southern Cal. Edison Co.*, 376 U.S. 205, 215-16 (1964). See also *Montana-Dakota Utils. Co.* v. *Northwestern Pub. Serv. Co.*, 341 U.S. 246 (1951). "FERC's exclusive jurisdiction applies not only to rates but also to power allocations that affect wholesale rates. . . . States may not bar regulated utilities from passing through to retail consumers FERC-mandated wholesale rates." *MP&L*, 487 U.S. at 371-72 (citation omitted). The filed-rate doctrine and other preemption principles "enforce the exclusive jurisdiction vested by Congress in FERC." *Nantahala*, 476 U.S. at 966. However the state characterizes its action, it is preempted if its "effect" is to interfere with FERC's interstate "allocation of costs." *Maryland* v. *Louisiana*, 451 U.S. 725, 749-50 (1981).

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[4] *See* 16 U.S.C. § 824 (providing FERC with exclusive jurisdiction to regulate the "transmission" and the "sale of electric energy at wholesale in interstate commerce"); *FPC* v. *Southern Cal. Edison Co.*, 376 U.S. 205, 215-16 (1964) (FERC has plenary jurisdiction to regulate all aspects of wholesale transactions, regardless of the impact on state regulation).

In this case, in violation of these principles, the Louisiana Supreme Court held that the LPSC had jurisdiction to decide that "ELI's failure to make steps to minimize its MSS-1 payments after the effective date of the amendment to Section 10.02 of the System Agreement" was imprudent. App. 19a. The state court rested its holding on two purported exceptions to FERC's exclusive jurisdiction. First, the state court held that the *Pike County* exception, which allows states to determine the prudence of certain decisions by utilities to make purchases at FERC-filed rates, applied. *Id.* at 15a-17a. Second, the Louisiana court held that the LPSC had jurisdiction, because "FERC never ruled on the issue of whether ELI's decision [sic] to continue to include the ERS units is a prudent one." *Id.* at 19a.[5] In *MP&L* and *Nantahala*, however, this Court affirmed the filed-rate doctrine in this very context. It expressly rejected the application of the *Pike County* exception to rate schedules governing the allocation of costs within integrated, multi-state systems, and it held that States are prohibited from regulating in areas governed by FERC even if FERC has not yet acted.

In *MP&L*, the Court reviewed a judgment of the Mississippi Supreme Court that required the state utility commission to examine the prudence of the management decisions that led Middle South Utilities (now Entergy) to construct a nuclear power plant called Grand Gulf 1. The Mississippi court stated that it had become "obvious" by the early 1980's, that "both the cost and demand projections related to Grand Gulf were terribly incorrect," and thus ordered a prudence "review" to determine whether the system "acted reasonably when they constructed Grand Gulf 1, in light of the change in demand for electric power . . . and the sudden escalation of costs." *State ex rel. Pittman* v. *Mississippi Pub. Serv. Comm'n*, 506 So. 2d 978, 986, 987

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[5] The decision was not, of course, ELI's, but that of the System Operating Committee that administers the System Agreement.

(Miss. 1987) (en banc); *MP&L*, 487 U.S. at 368. This review would have decided the extent to which MP&L had been imprudent with respect to Grand Gulf expenditures and thus the extent to which Grand Gulf costs should be "trapped" and borne by the utility's shareholders, rather than "passed on to MP&L's retail customers." *MP&L*, 487 U.S. at 372 n.12. The state court also held that "'[a]s to those matters not resolved by the FERC, state regulation is *not preempted provided that* State regulation would not contradict or undermine FERC determinations and federal interests, or impose inconsistent obligations on the utility companies involved.'" 506 So. 2d at 986.

MP&L, however, held that the state court's judgment was preempted by federal law. It reaffirmed this Court's earlier decision in *Nantahala* and held that the Federal Power Act and the Supremacy Clause "preclude [such a] review of MP&L's managerial prudence." 487 U.S. at 369. It held that a state retail ratemaking body "may not enter an order 'trapping' the costs MP&L [and other system operating companies are] mandated to pay under the FERC order allocating Grand Gulf power or undertake a 'prudence' review for the purpose of deciding whether to enter such an order." *Id.* at 372 & n.12. "States may not alter FERC-ordered allocations of power by substituting their own determinations of what would be just and fair." *Id.* at 371. See also *Nantahala*, 476 U.S. at 970.

In *MP&L*, this Court made it explicit that FERC had exclusive jurisdiction to determine the prudence of decisions of MP&L and other system operating companies. All such "prudence" claims, the Court said, were matters "FERC easily could have considered in determining whether to permit [the system] to recoup 100% of the costs of Grand Gulf in the wholesale rates it charged to the four operating companies and in allocating Grand Gulf Power" among those companies. *MP&L*, 487 U.S. at 375. The Court explicitly rejected the argument that state commissions have authority to bar

recovery of FERC-mandated wholesale costs on grounds that could have been raised before FERC. *Id.* At bottom, "[t]he reasonableness of rates and agreements regulated by FERC may not be collaterally attacked in state or federal courts. The only appropriate forum for such a challenge is before the Commission or a court reviewing the Commission's order." *Id.*

Equally to the point, the *MP&L* Court specifically recited the *Pike County* exception and rejected its application to the case before it. As the Court observed, that exception applies only if a utility unreasonably purchases high-cost power at FERC-approved rates when the utility "had the legal right to refuse to buy that power." *Id.* at 374. Just as here, in *MP&L*, the utilities had no choice but to accept the allocation of costs and power in the FERC-approved rate schedule: "[I]f the integrity of FERC regulation is to be preserved, it obviously cannot be unreasonable for MP&L to procure the particular quantity of high-priced Grand Gulf power that FERC has ordered it to pay for." *Id.* All nine members of the Court recognized that although FERC determines only the seller's prudence in an ordinary bilateral transaction, FERC necessarily determines the prudence of buyer and seller when, as here, the power supply arrangements are those of an integrated power pool. *Id.* at 357, 363, 374-75; *id.* at 378 (Scalia, J., concurring); *id.* at 386 (Brennan, J., dissenting). See also *AEP Generating Co.*, 36 FERC ¶ 61,226 (1986); *AEP Generating Co. & Ky. Power Co.*, 38 FERC ¶ 61,243 (1987).

Similarly, in *Nantahala*, this Court held that state retail rate orders may not disregard FERC's allocation of low-cost power among operating companies in an affiliated, multi-state system in setting retail rates. This allocation was part and parcel of FERC's exclusive authority to determine wholesale rates, because it "determine[d] the amount of low-cost power that [Nantahala] may obtain, and FERC required Nantahala's

wholesale rate to be filed in accordance with that allocation." 476 U.S. at 967. Thus, the Court explained:

> The filed rate doctrine ensures that sellers of wholesale power governed by FERC can recover the costs incurred by their payment of just and reasonable FERC-set rates. When FERC sets a rate between a seller of power and a wholesaler-as-buyer, a State may not exercise its undoubted jurisdiction over retail sales to prevent the wholesaler-as-seller from recovering the costs of paying the FERC-approved rate. *Such a "trapping" of costs is prohibited.* Here, [the wholesaler as seller] cannot fully recover its costs of purchasing at the FERC-approved rate if [the state commission's] order is allowed to stand. [*Id.* at 970 (emphasis supplied).]

In *Nantahala*, too, the Court expressly found the *Pike County* exception inapplicable. "Without deciding this issue," the Court assumed "that a particular quantity of power procured by a utility from a particular source could be deemed unreasonably excessive if lower cost power is available elsewhere, even though the higher cost power actually purchased is obtained at a FERC-approved, and therefore reasonable, price." *Id.* at 972 (emphasis ommitted). Nantahala, however, "could not have treated itself as having access to any more low-cost entitlement power than it is eligible to include under FERC's interpretation of what would be a fair allocation," *id.* at 972-73; accordingly, *Pike County* did not apply.

MP&L and *Nantahala* govern this case. This authority precludes the argument that the LPSC or the state court can decide that ELI imprudently failed to minimize its MSS-1 payments. Under the System Agreement, the Entergy Operating Committee determined whether ERS units should be included in MSS-1 payment calculations. The System Agreement – which is a binding FERC rate schedule – governs ELI's costs. If the LPSC wishes to challenge that determination, it must do so before FERC, which has

exclusive jurisdiction to decide whether its rate schedule, the System Agreement, was violated or imprudent. Indeed, the FERC proceedings addressing the inclusion of ERS units in MSS-1 payment calculations prior to August 5, 1997, demonstrate that FERC has jurisdiction over this question and that the state action here is preempted. As *MP&L* and *Nantahala* hold, the *Pike County* exception has no application in these circumstances.

The Louisiana Supreme Court also erred in concluding that the LPSC had jurisdiction to assess the prudence of the Operating Committee's decision to include ERS units in MSS-1 payment calculations, because "FERC never ruled on the issue of whether ELI's decision [sic] to continue to include the ERS units is a prudent one." App. 19a. In essence, the court is saying that the LPSC can evade FERC's exclusive jurisdiction simply by deciding not to file a complaint with FERC challenging the Operating Committee's determination under Section 10.02 of the System Agreement. In *MP&L*, this Court considered and rejected the Mississippi court's holding that "the pre-emptive effect of FERC jurisdiction turned on whether a particular matter was actually determined in the FERC proceedings." 487 U.S. at 374 (citing 506 So. 2d at 986). The Court explained that it has "long rejected this sort of case-by-case analysis of the impact of state regulation upon the national interest in power regulation cases." *Id.* (internal quotation marks omitted) (quoting *Nantahala*, 476 U.S. at 966). Thus, "[t]he reasonableness of rates and agreements regulated by FERC may not be collaterally attacked in state or federal courts. The only appropriate forum for such a challenge is before the Commission or a court reviewing the Commission's order." *Id.* at 375.

Ultimately, in *MP&L*, the Court concluded that the issue of prudence was not discussed in FERC proceedings or on review of FERC orders "because no party raised the issue, not because it was a matter beyond the scope of FERC's

jurisdiction." *Id.* at 375. Similarly here, the LPSC's failure to challenge the Operating Committee's decision to include ERS units in MSS-1 payments after August 5, 1997 does not deprive FERC of exclusive jurisdiction. The LPSC simply "cannot evaluate . . . the prudence of [the] decision to [include ERS costs in MSS-1 payment calculations] without traversing matters squarely within FERC's jurisdiction." *Id.* at 376.

The decision below conflicts not only with this Court's precedent, but also with the decisions of numerous state supreme courts. In addition to the numerous such decisions that hold that the filed-rate doctrine requires that FERC-regulated expenses be treated as reasonable operating expenses in setting retail rates,[6] at least five state supreme courts that have held that FERC's jurisdiction preempts states from rejecting FERC-mandated costs on prudence grounds. See, *e.g.*, *General Motors Corp.* v. *Illinois Commerce Comm'n*, 574 N.E.2d 650, 655-58 (Ill. 1991) (filed rate doctrine applies to costs associated with procurement of gas and state commission has no authority to conduct prudence review of such costs); *Maine Yankee Atomic Power Co.* v. *Maine Pub. Utils. Comm'n*, 581 A.2d 799, 803-04 (Me. 1990) (FERC has exclusive jurisdiction to determine utility's plant decommissioning expense and state commission could not assess the prudence of that expense); *Eastern Edison Co.* v. *Department of Pub. Utils.*, 446 N.E.2d 684, 688 (Mass. 1983) (FERC has exclusive jurisdiction to determine whether utility system was imprudent in failing to take greater steps to minimize risks in construction of plant); *Northern States Power Co.* v. *Minnesota Pub. Utils. Comm'n*, 344 N.W.2d 374, 381-82 & n.17 (Minn. 1984) (FERC has exclusive jurisdiction to assess the prudence of system's decision to

[6] *See Narragansett Elec. Co.* v. *Burke*, 381 A.2d 1358, 1362 (R.I. 1977); *Hopewell Cogeneration Ltd. P'ship* v. *State Corp. Comm'n*, 453 S.E.2d 277, 282 (Va. 1995); *Hamm* v. *Public Serv. Comm'n*, 425 S.E.2d 28, 30 (S.C. 1992); *Appeal of Northern Utils., Inc.*, 617 A.2d 1184, 1186 (N.H. 1992).

cancel a nuclear plant and obtain coal-fired power instead); *Northern States Power Co.* v. *Hagan*, 314 N.W.2d 32, 38 (N.D. 1981) ("it would undermine the supremacy clause and the preemption doctrine for the [state] to indirectly assert jurisdiction over the wholesale rates by investigating the reasonableness of underlying costs in a proceeding involving retail rates").

The courts of appeals for the Fourth, First, Ninth, Eighth, and District of Columbia Circuits, too, have each upheld FERC's exclusive jurisdiction to make prudence decisions that affect FERC rate schedules governing integrated, multi-state power systems. See *Appalachian Power Co.* v. *Public Serv. Comm'n*, 812 F.2d 898 (4th Cir. 1987) (holding that the essence of the *Pike County* exception is choice and therefore that the prudence inquiry that the state commission sought to undertake was an impermissible duplication of the inquiry into the justness and reasonableness of the allocation agreement that was subject to the exclusive jurisdiction of FERC). See also *Public Serv. Co.* v. *Patch*, 167 F.3d 15, 27 (1st Cir. 1998); *Transmission Agency* v. *Sierra Pac. Power Co.*, 295 F.3d 918, 930 (9th Cir. 2002); *Middle S. Energy, Inc.* v. *Arkansas Pub. Serv. Comm'n*, 772 F.2d 404 (8th Cir. 1985); *South Dakota Pub. Utils. Comm'n* v. *FERC*, 690 F.2d 674 (8th Cir. 1982) (per curiam); *Anaheim, Cal.* v. *FERC*, 669 F.2d 799 (D.C. Cir. 1981).[7]

The only decision that provided any support for the LPSC's action here is the decision of the Fifth Circuit in *NOPSI*. In

[7] The only circumstances in which either FERC or the lower courts have permitted states to bar recovery of costs under FERC rate schedules is where FERC regulation has *not* allocated costs to a particular utility, and where the utility has a *choice* to obtain the power from one of many sources. *Pike County Light & Power Co.* v. *Pennsylvania Pub. Util. Comm'n*, 465 A.2d 735, 738 (Pa. 1983). *See also Kentucky W. Va. Gas Co.* v. *Pennsylvania Pub. Util. Comm'n*, 837 F.2d 600, 608-09 (3d Cir. 1988); *Appeal of Sinclair Mach. Prods., Inc.*, 498 A.2d 696, 703 (N.H. 1985).

that case, the court of appeals recognized that a New Orleans City Council order "prevented NOPSI from recovering, in its retail rate, wholesale costs FERC ordered it to incur as a result of its participation in [Grand Gulf 1]." 911 F.2d at 995. The Fifth Circuit also recognized (as the Louisiana Supreme Court did not) that states could not regulate matters that are within FERC's jurisdiction. *Id.* at 1001. However, the Fifth Circuit held that New Orleans had jurisdiction to determine that NOPSI's failure to minimize its allocation of Grand Gulf 1 power was imprudent. *Id.* at 1002. The court concluded that *MP&L* and *Nantahala* established only that "FERC had jurisdiction to determine whether [NOPSI and other system operating companies] acted prudently in deciding to participate in the Grand Gulf venture" initially, and that these cases had not decided "whether FERC has jurisdiction to determine whether NOPSI acted prudently once the Grand Gulf project was underway." *Id.* at 1001. Thus, the court held that states, and not FERC, have exclusive jurisdiction to determine the "prudence" of a utility's failure to "minimize its losses" by "diversify[ing] its supply portfolio." *Id.* at 1001, 1002.

The decision below and *NOPSI* directly contravene this Court's decisions. The fact that the Louisiana Supreme Court and the Fifth Circuit so misread *MP&L*, *Nantahala*, and decades of preemption law – and held that state law review is the only limitation on state subversion of FERC regulation – makes resolution of this conflict and review of this decision a matter of compelling importance.

II. RESOLUTION OF THIS CONFLICT IS A MATTER OF GREAT NATIONAL IMPORTANCE.

Resolution of the conflict described above is a matter of great national importance. In 1935, Congress enacted the Federal Power Act directing FERC to "promote and encourage" "voluntary interconnection and coordination of facilities for the generation, transmission, and sale of electric energy" in the interest of "assuring an abundant supply of

electric energy throughout the United States with the greatest possible economy." 16 U.S.C. § 824a(a). See also Public Utility Holding Company Act, 15 U.S.C. § 79a(a) (finding that sales and exchanges of power within power pools "are not susceptible of effective control by any State"). In the years that followed, utility companies developed power pools and integrated power networks transcending state boundaries. In recent years, the electric utility industry has become much more highly interconnected and is now a national business.

This trend serves Congress' purpose in enacting the Federal Power Act. As one commenter summarized:

> It is universally accepted that interconnection and coordination of the facilities of separate electric companies is in the public interest. Among the most obvious benefits of such coordination are (1) the exploitation of economies of scale in building generating and transmission facilities; (2) the avoidance of unnecessary duplication of facilities; (3) the ability to place generating facilities at the most advantageous sites, regardless of ownership; (4) increased reliability because of the availability of emergency support from interconnected systems; and (5) operating economies which can be achieved by dispatching the lowest cost generation, regardless of ownership, to serve demands on the interconnected and coordinated systems. [K. Duffy, *Will the Supreme Court Lose Patience With Prudence?* 9 Energy L.J. 83, 98-99 (1988).]

See also Regional Transmission Organization, 65 Fed. Reg. 809 (Jan. 6, 2000) (codified at 18 C.F.R. pt. 35) (FERC Order No. 2000) (addressing the economic and service benefits of consolidation of small independent electricity transmission systems into large Regional Transmission Organizations). As a result, "[t]he necessity for federal leadership in securing planned coordination of the facilities of the industry which alone can produce an abundance of electricity at the lowest

possible costs" is as pressing now as it was in 1935. S. Rep. No. 74-621, at 17 (1935).

This case is like *MP&L* and *Nantahala* in that here, as in those cases, the lower court embraced a sweeping exception to well-settled principles that would subvert the orderly scheme that Congress has created and impede fulfillment of Congress' stated purpose. Under this exception, each FERC cost allocation could be re-litigated in each state served by a multi-state power system, and states could interpose "local" parochial interests to preclude the integrated, multi-state planning that the Federal Power Act seeks to encourage. See Duffy, *supra* at 99 ("[a] pooling arrangement simply will not work if each participant continually seeks to maximize its own benefits or minimize its own costs at the expense of the other participants").

A state can always claim that a utility should have minimized its losses by purchasing lower-cost power or refusing to accept its allocated share of the costs of the multi-state system. "Only FERC, as a central regulatory body, can make the comprehensive public interest determination contemplated by the [Federal Power Act] . . . . Lodging exclusive authority in FERC to consider the merits of the [allocation] thus forecloses the potential for differing state pronouncements regarding an agreement involving utilities regulated by various states." *Appalachian Power Co.*, 812 F.2d at 905. See also *Arkansas Elec. Co-op. Corp.*, 461 U.S. at 377; *Southern Cal. Edison Co.*, 376 U.S. at 215-16; *Public Utils. Comm'n* v. *Attleboro Steam & Elec. Co.*, 273 U.S. 83, 89-90 (1927) (expressing concern about parochial state regulation that burdens interstate commerce by requiring exclusive federal regulation of all wholesale power transactions), *overruled on other grounds by Arkansas Elec. Co-op Corp.* v. *Arkansas Pub. Serv. Comm'n*, 461 U.S. 375 (1983); *Massachusetts, Dep't of Pub. Utils.* v. *United States*, 729 F.2d 886, 888 (1st Cir. 1984) (Breyer, J.) (each state would seek to "benefit[] its residents to the detriment of its

neighbors"). When the interests of several states are at odds because of their participation in a multi-state power system and where a decision of one state in favor of its citizens is likely to have an adverse effect on the citizens of other participating states, FERC's jurisdiction is most necessary. That critically important necessity is ignored and thus threatened by the state court decision in this case.

Indeed, related events in Louisiana underscore the threat to the regime of the Federal Power Act, for the LPSC's assertion of authority over FERC-jurisdictional issues in this case was not a one time event, but part of an emerging pattern that appears to represent an overall strategic plan. In another matter, the same special counsel to the LPSC in the case below and in the ERS proceedings at FERC advised the LPSC that when "the Louisiana Commission has a problem with what FERC wants to do" and when it faces "a matter of rather large consequence to the LPSC," the LPSC should not merely participate in proceedings before FERC, but should act in its own right. LPSC Sept. 19, 2001 Business and Executive Session Tr. at 78. Special counsel advised that "if somebody wanted to try to stop the LPSC, . . . it would happen on Louisiana turf." *Id.* at 83.

The LPSC is thus now using its asserted jurisdiction over ELI's prudence to re-determine matters that are within FERC's jurisdiction. Specifically, the LPSC filed a complaint at FERC that contended that the Entergy system has failed to achieve the "rough" production cost equalization required by FERC and that modifications to the System Agreement are required to make it just, reasonable, and nondiscriminatory within the meaning of the Federal Power Act,[8] and FERC is now conducting a massive proceeding in which it is addressing these issues and related issues raised by other state utility commissions that regulate different Entergy operating

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[8] *Louisiana Pub. Serv. Comm'n & the Council of the City of New Orleans* v. *Entergy Corp.*, 98 FERC ¶ 61,135, at 61,390 (2002).

companies.[9] But rather than await and accept the outcome of this FERC proceeding, the LPSC has instituted a separate proceeding in which it is investigating, inter alia, whether "the production costs of the Entergy operating companies [are] equalized, or roughly equalized" and if not, whether "[ELI] acted imprudently in failing to seek changes in the [system] agreement that would bring about the appropriate cost equalization" and in which it would order rate reductions and refunds to the extent that such "imprudence" is found.[10] This proceeding requires the Entergy System to litigate the same matters before the LPSC that are pending before FERC.

The LPSC's other actions dramatically underscore the great national importance of resolving the issues presented in this Petition. Unless the Louisiana Supreme Court's holding is reviewed and reversed, the range of circumstances in which the LPSC and other state commissions can assert parochial interests to disrupt the interstate allocations of bulk power supply is virtually unlimited. The federal scheme for regulation of the electric power industry is profoundly endangered by the holdings in this case and in *NOPSI*.

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[9] 98 FERC at 61,392-93

[10] *Investigation Of Retail Issues Related Entergy System Agreement Billings*, No. U-25888, slip op. at 1 (La Pub. Serv. Comm'n Jan. 4, 2002).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

SUPREME COURT OF LOUISIANA

No. 2001-CA-1725

ENTERGY LOUISIANA, INC.

v.

LOUISIANA PUBLIC SERVICE COMMISSION, et al.

Filed April 3, 2002

Rehearing Denied May 24, 2002.

JOHNSON, Justice.*

Entergy Louisiana, Inc. ("ELI") filed suit in the Nineteenth Judicial District Court for the Parish of East Baton Rouge seeking a stay or injunctive relief with respect to portions of Order No. U-20925-G issued by the Louisiana Public Service Commission ("LPSC"). By its Order, the LPSC prohibited ELI from including generating units which are in Extended Reserve Shutdown status in the calculation of reserve equalization payments under Service Schedule MSS-1 of the Entergy System Agreement. The LPSC further ordered ELI to credit the overpayments back to its customers. The district court upheld the Order, finding that the LPSC's findings were neither arbitrary nor capricious and that the entity had acted within its constitutional and statutory authority. ELI appealed

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* Retired Judge Robert L. Lobrano, assigned as Justice *Pro Tempore*, participating in the decision.

that judgment pursuant to La. Const. Art. IV, § 21(E).[1] The sole issue presented for review is whether the LPSC is federally preempted from assessing the prudence of ELI's decision in continuing to include the ERS units in its MSS-1 calculations. After a thorough review of the record, briefs, and relevant authorities, we hold that the LPSC is not precluded from assessing the prudence of ELI's actions and that the LPSC's ruling was not arbitrary or capricious or clearly erroneous. Accordingly, we affirm the LPSC's ruling.

FACTS AND PROCEDURAL HISTORY

Background

The LPSC is an independent regulatory agency created by the Louisiana Constitution. It exercises regulatory authority over most retail electric rates and charges in Louisiana. Pursuant to La. Const. Art. IV, § 21, the LPSC has the power to regulate common carriers and public utilities in the State of Louisiana. LSA-R.S. 45:1163 provides in pertinent part:

> A. The Commission shall exercise all necessary power and authority over any street railway, gas, electric light, heat power, waterworks, or other local public utility for the purpose of fixing and regulating the rates charged or to be charged by and service furnished by such public utilities.

The Federal Energy Regulatory Commission ("FERC") is an independent regulatory agency within the United States Department of Energy which regulates, *inter alia,* the

[1] La. Const. Art. IV, § 21(E) provides in pertinent part:

> Appeal may be taken in the manner provided by law by any aggrieved party or intervenor to the district court of the domicile of the commission. A right of direct appeal from any judgment of the district court shall be allowed to the supreme court. These rights of appeal shall extend to any action by the commission, including but not limited to action taken by the commission or by a public utility. . . .

transmission and sale of electric energy at wholesale in interstate commerce. *See* 16 U.S.C.A. §§ 824 *et seq.;* 42 U.S.C.A. §§ 7101 *et seq.* The Federal Power Act defines "sale of electric energy at wholesale in interstate commerce" as the "sale of electric energy to any person for resale." 16 U.S.C.A. § 824(d). However, the Federal Power Act limits federal regulation of electric utilities engaged in interstate commerce "to those matters which are not subject to regulation by the States." 16 U.S.C.A. § 824(a).

ELI is an electric public utility wholly owned by Entergy Corporation, which also owns four other operating companies: Entergy Arkansas, Inc., Entergy Gulf States, Inc., Entergy Mississippi, Inc., and Entergy New Orleans, Inc. ELI operates in forty-three Louisiana parishes. The five operating companies plan, construct, and operate their collective electric generating and transmission facilities as a single, integrated system serving parts of Louisiana, Arkansas, Mississippi, and Texas. The costs and benefits of the coordinated operation of this interstate system are distributed among the operating companies pursuant to a rate schedule known as the Entergy System Agreement ("System Agreement").[2] The System Agreement governs many of the transactions among the operating companies, and its general purpose is set forth in Article III of the Agreement, which states:

> The purpose of this Agreement is to provide the contractual basis for the continued planning, construction, and operation of the electric generation, transmission and other facilities of the [Operating] Companies in such a manner as to achieve economies

[2] The System Agreement was initially entered into on April 23, 1982. At that time, the operating companies included Arkansas Power & Light Company, Gulf States Utilities Company, Louisiana Power & Light Company, Mississippi Power & Light Company, New Orleans Public Service Inc., and Entergy Services, Inc. The Agreement became effective August 1, 1982.

> consistent with the highest practicable reliability of service, subject to financial considerations, reasonable utilization of natural resources and minimization of the effect on the environment. This Agreement also provides a basis for equalizing among the companies any imbalance of costs associated with the construction, ownership and operation of such facilities as are used for the mutual benefit of all the [Operating] Companies.

The System Agreement is a tariff approved by the FERC, and any revisions or amendments to the Agreement/tariff must be approved by the FERC. The overall administration of the Agreement is carried out by the Entergy Operating Committee, pursuant to Section 2.06 of the System Agreement. The Agreement is a binding contract on all of the operating companies, and pursuant to Section 1.01, termination of participation in the Agreement by any of the companies requires ninety-six months (eight years) written notice to the other companies.

The System Agreement allows the operating companies, among other things, to enter into arrangements among themselves to exchange resources. For instance, if one company is unable to meet the energy requirements for its system, it may make arrangements with one of the other companies to use its facilities and/or energy supply. The arrangements for such exchanges must be in the form of a Service Schedule which becomes a part of the System Agreement subsequent to FERC approval.

Since the effective date of the System Agreement, various FERC-approved Service Schedules have been added, one of which is Schedule MSS-1 ("MSS-1").[3] MSS-1 is set forth in

[3] The "MSS" moniker refers to Middle South Services. In the late 1980s, Middle South Services changed its name to Entergy, and MSS is merely a "holdover" from the old company name. The number "1" indicates that it was the first Service Schedule to be added as an ancillary to the System Agreement.

Section 10 of the System Agreement and provides the mechanism for equalizing system reserves among the operating companies. Pursuant to MSS-1, each of the operating companies is responsible for a share of the total Entergy system capability. Each company's share is equal to the ratio of that company's contribution to the system's yearly average peak load. Some of the companies provide more than their calculated share of the system's capability, while others provide less than their calculated share. The companies providing less than their calculated share make deficiency payments to the companies providing more than their share. For example, if one company has reserves (excess capacity), and the other four companies do not, the other four companies may use the reserves, but must make payments to the company for their use. The revenue received from the other four companies is credited against the company with the reserve's payment to the system. Each of the operating companies makes or receives payments based on whether its capacity exceeds, equals, or is less than the system capability for which it is responsible.

In order to be counted as part of a company's capability for determining MSS-1 payments, a generating unit has to be "available" for use by the system. Prior to August 5, 1997, Section 10.02 of the System Agreement provided in relevant part:

> A unit is considered available to the extent the capability can be demonstrated and (1) is under the control of the System Operator, or (2) is down for maintenance or nuclear refueling.
>
> A unit is considered unavailable if, in the judgment of the Operating Committee, it is of insufficient value in supplying system loads because of (1) obsolescence, (2) physical condition, (3) reliability, (4) operating cost, (5)

> start-up time required, or (6) lack of due diligence in effecting repairs or nuclear refueling in the event of a scheduled or unscheduled outage.

Several years after the System Agreement was executed, the operating companies had excess generating capacity. The companies conceived the Extended Reserve Shutdown (ERS) program, which allows the companies to save money (for the customers, as well as for the companies themselves) by placing the excess generating units in an inactive, *i.e.* extended reserve status. Rather than disposing of units not in use, the companies kept twenty-four units on standby to have the power capacity for the future, in the event there was an increase in power demand. By placing the units in extended reserve status, the companies were able to reduce operating staff and maintenance costs and defer costs of repairing the units.[4] The ERS units were not available to serve customers and, therefore, did not meet the definition of "available" in the System Agreement because they were not "down for maintenance or nuclear refueling" as required by the Agreement. Nonetheless, Entergy included the ERS units for purposes of calculating the Entergy operating companies' capability under MSS-1. This treatment of the inactive units resulted in ELI making higher MSS-1 payments than it would have had if the units had not been included in the computation. These costs were passed on to ELI customers in the form of higher retail electricity rates.

The Proceedings Before the FERC

In 1993, Gulf States Utilities Company ("Gulf States") merged with Entergy Corporation, and Entergy sought to amend the System Agreement to add Gulf States as an operating company subsidiary. In connection with the events surrounding the merger, the FERC reviewed the System

[4] By 1999, all of the ERS units, with the exception of one, had either been returned to active service, or was scheduled for return to service.

Agreement and, thereafter, initiated proceedings to determine whether Entergy had violated the Agreement by including the ERS units in its MSS-1 calculations. The LPSC intervened in the FERC proceeding, alleging that Entergy violated the System Agreement by counting the ERS units as available capacity. To remedy the alleged violation, the LPSC sought retroactive refunds for Entergy's Louisiana customers, plus interest.

Following an evidentiary hearing, a FERC administrative law judge concluded that (1) the language of the System Agreement permits Entergy to include generating units in MSS-1 calculations only to the extent that such units are "available;" (2) Entergy's ERS units are not "available" under Schedule MSS-1; and (3) the inclusion of ERS units in MSS-1 calculations is a violation of the System Agreement. *Entergy Services, Inc. and Gulf States Utility Company*, Initial Decision, 70 FERC ¶ 63,018, 1995 WL 85464 (March 3, 1995).

The FERC affirmed the administrative law judge's determination, stating that Entergy does not have "broad, unfettered discretion to decide which units should be eligible for inclusion in Schedule MSS-1 computation." *Entergy Services, Inc. and Gulf States Utilities Company*, Opinion No. 415, 80 FERC ¶61,197 at p. 61,786, 1997 WL 438886 (August 5, 1997). However, the FERC declined to order a refund of overpayments made as a result of the violation, stating:

> By including ERS units in the Schedule MSS-1 computation, Entergy continued the previously-approved equalization approach that was established for excess capacity on the Entergy System. Moreover, if Entergy had not undertaken to reduce costs for its system by implementing the ERS program, these units would have been eligible for inclusion in Schedule MSS-1. We do not believe that the Operating Companies should lose the

> right to have their costs equalized when they take advantage of the ERS program, which, we note, provides very significant benefits for the Entergy system.
>
> * * *
>
> By exercising our discretion not to order refunds, we are simply acting consistent with the equities in this case. Indeed, the record evidence demonstrates that, although Entergy acted in a manner inconsistent with Schedule MSS-1, the end result was just, reasonable, and not unduly discriminatory.

Id. at p. 61,788, 1997 WL 438886. Instead, the FERC approved a proposed amendment to Section 10.02 of the System Agreement, effective August 5, 1997, which allows the ERS units to be considered "available" under certain instances. The amendment provides, in pertinent part:

> A unit is considered available to the extent the capability can be demonstrated and (1) is under the control of the System Operator, or (2) is down for maintenance or nuclear refueling, *or (3) is in extended reserve shutdown (ERS) with the intent of returning the unit to service at a future date in order to meet Entergy System requirements. The Operating Committee's decision to consider an ERS unit to be available to meet future System requirements shall be evidenced in the minutes of the Operating Committee and shall be based on consideration of current and future resource needs, the projected length of time the unit would be in ERS status, the projected cost of maintaining such unit, and the projected cost of returning the unit to service.*

The FERC rejected the LPSC's contention that the language of the amendment is ambiguous and does not limit Entergy's judgment to make decisions on ERS units. The FERC concluded that the amendment serves to rectify the prior Section 10.02's failure to expressly encompass the ERS

program. The FERC subsequently denied the LPSC's request for rehearing. *Entergy Services, Inc. and Gulf States Utilities Company*, FERC Order No. 415-A, 1998 WL 38137 (February 3, 1998).

The Proceedings Before the LPSC

Each year, ELI files with the LPSC certain financial data for the prior year, calculating its cost of services. The LPSC uses the data to determine ELI's future retail rates. When ELI made its rate filing in 1997 for the 1996 test year, it included all of the generating units in ERS status. The LPSC's Special Counsel objected, contending: (1) the overpayments resulting from the inclusion of units in ERS status in MSS-1 should be removed from the 1996 test year operating expenses because they were made in violation of the FERC tariff; and (2) ELI's continued use of ERS units in the MSS-1 calculation violates the amended Section 10.02 of the System Agreement because there is no evidence that Entergy has any "plan" for returning these units to service. Therefore, Special Counsel contended, such overpayments should not be recovered from Louisiana ratepayers. After considering the record, the LPSC ordered ELI to remove from its calculations "all MSS-1 overpayments incurred on or after August 6, 1997." *L.P.S.C. Order No. U-20925-G* at p. 25. The LPSC further ordered ELI to credit the overpayments "back to ratepayers." *Id.*

The LPSC found, *inter alia*, that Entergy's treatment of the ERS units benefits companies such as Arkansas Power & Light, while resulting in increased MSS-1 payment obligations to companies such as ELI and Mississippi Power & Light. The LPSC concluded that there exists no FERC order or other federal regulation that makes it mandatory for ELI to treat ERS units as available after August 5, 1997. The LPSC also concluded that ELI was put on notice by the FERC order that the MSS-1 treatment of ERS units was in violation of the System Agreement, and it resulted in significantly higher

MSS-1 payments by ELI to its sister companies. The LPSC further found that ELI did not consider the effect of increased MSS-1 payments on its retail rates in Louisiana when it decided to continue the MSS-1 treatment of ERS units after August 5, 1997, and the company failed to minimize its operating costs by continuing such treatment.

The LPSC stated that ELI's duty to incur prudent costs and avoid imprudent costs includes the duty to follow the criteria set forth in the amended Section 10.02 in reaching a decision regarding the availability status of ERS units after August 5, 1997. The LPSC found that when the Operating Committee made that decision, it did not have complete or accurate information before it regarding the costs of returning ERS units back to service, nor did the Operating Committee make necessary efforts to ascertain its "current and future resource needs, the projected length of time the unit would be in ERS status, the projected cost of maintaining such unit, and the projected cost of returning the unit to service," all as required by amended Section 10.02. In particular, the LPSC relied upon testimony given by Kenneth Turner, Secretary of the Operating Committee and Director of Resource Planning for Entergy Services, Inc.[5] According to LPSC's findings of fact, in a September 1997 presentation to the Operating Committee, Turner distributed a single sheet of paper showing the estimated cost of return to service of the ERS units including capital investment and five-year operation and maintenance costs on a net-present-value basis. The LPSC found that neither Turner nor his staff prepared any analyses of what it would cost to return the ERS units to service, and, at the time the Operating Committee decided to classify the units as available, Turner had not seen any analyses or studies concerning what it would cost to return the ERS units to

[5] Entergy Services, Inc. is the service company of Entergy Corporation which performs, among other activities, integrated planning for Entergy's Operating Companies.

service. Turner acknowledged that a later conducted Raytheon study [6] was more detailed and reflected better estimates of the cost of returning the ERS units to service, and that in several instances the cost estimates contained in the Raytheon study were more than twice as high as the estimates Turner provided to the Operating Committee. The LPSC further found that the Raytheon study was not available to the Operating Committee when it made the decision to classify the ERS units as available. Finally, the LPSC found that Turner's testimony that he could not give "a day, a week, a month, or even a year for any of the 24[ERS] units . . . [or] a definite date when any of these units . . . will come out" indicates that there was no plan in place to return the units to service. Nevertheless, he asserted that these units would be needed in the "relative near term," which he defined to mean "any time within the next 10 years." Based on these aspects of Turner's testimony, the LPSC concluded that the MSS-1 payments made subsequent to the August 5, 1997 FERC Order were known to ELI, or should have been known, to be unreasonable and imprudent at the time the expenses were incurred.

The LPSC concluded:

> The increased MSS-1 payments resulting from the treatment of ERS units as available under Schedule MSS-1 in violation of a FERC tariff should be removed from the company's calculation of its cost of service, but such disallowance should be prorated because FERC Order No. 415 imposed an obligation on ELI to make those payments for a part of the rate effective period (i.e., up to August 5, 1997).

L.P.S.C. Order No. U-20925-G at p. 25.

[6] In August, 1997, at Entergy's request, Raytheon Engineers & Constructors, Inc. conducted a study estimating the cost of returning the ERS units to service.

ELI filed a petition for judicial review of the LPSC Order on February 17, 1999.[7] After a hearing, the district court affirmed the Order, stating:

> The Court has carefully reviewed this matter and is of the Opinion that the Public Service Commission was neither arbitrary nor capricious in its finding that Entergy could not pass on the ELI overpayment to Louisiana consumers; nor was such ruling preempted by Federal Law and was not based on impermissible data. On the contrary, it was well within its constitutional and statutory authority. Therefore, the Order of the Public Service Commission is upheld.

The district court also granted a preliminary injunction, enjoining implementation and enforcement of the Order, pending a final judgment by this court.

ELI appealed to this court, arguing that the LPSC's actions were arbitrary and capricious and are barred by federal preemption and the doctrine of *res judicata*.

DISCUSSION

The law applicable to judicial review of orders of the LPSC is well-settled. This court has repeatedly stated:

> Initially, as the orders of the Commission are entitled to great weight, they should not be overturned absent a showing of arbitrariness, capriciousness, or abuse of authority by the Commission. Secondly, courts should be reluctant to substitute their own views for those of the expert body charged with the legislative function of rate-making. Lastly, a decision of the Commission will not be overturned absent a finding that it is clearly erroneous or that it is unsupported by the record.

[7] The LPSC order also adopted a "net proceeds" of debt methodology for determining ELI's capital structure. However, that portion of the order is not before this court as it was not appealed to the district court.

Entergy Gulf States, Inc. v. Louisiana Pub. Serv. Comm'n, 00-0336, p. 4 (La.9/1/00), 766 So.2d 521, 525, (citing *Entergy Gulf States, Inc. v. Louisiana Pub. Serv. Comm'n*, 98-1235, p. 6 (La.4/16/99), 730 So.2d 890, 897; *Entergy Gulf States, Inc. v. Louisiana Pub. Serv. Comm'n*, 98- 0881, p. 4 (La.1/20/99), 726 So.2d 870, 874; *Gulf States Util. Co. v. Louisiana Pub. Serv. Comm'n*, 96-0345, p. 2 (La.7/2/96), 676 So.2d 571, 573; *Central Louisiana Elec. Co. v. Louisiana Pub. Serv. Comm'n*, 508 So.2d 1361, 1364 (La.1987)).

This court has further stated:

> The Commission is an expert within its own specialized field and its interpretation and application of its own General Orders, as distinguished from legislative statutes and judicial decisions deserve great weight, because the Commission is in the best position to apply its own General Orders.

Entergy Gulf States, Inc. v. Louisiana Pub. Serv. Comm'n, 00-0336, at p. 4, 766 So.2d at 526, (citing *Entergy Gulf States, Inc. v. Louisiana Pub. Serv. Comm'n*, 98-1235 at p. 6, 730 So.2d at 897, citing *Dixie Elec. Membership Corp. v. Louisiana Pub. Serv. Comm'n*, 441 So.2d 1208, 1210 (La.1983)). In sum, "courts must affirm the Commission's rulings unless they are arbitrary or capricious, an abuse of authority, unsupported by the record, or clearly erroneous." *Entergy Gulf States, Inc. v. Louisiana Pub. Serv. Comm'n*, 00-0336, at p. 4, 766 So.2d at 526, (quoting *Entergy Gulf States, Inc. v. Louisiana Pub. Serv. Comm'n*, 98-1235 at p. 6, 730 So.2d at 897).

The first issue presented for our review is whether the LPSC exceeded its authority when it reviewed ELI's actions regarding including the ERS units in its calculations for MSS-1 payments. In essence, ELI contends that because the issue of violation of or compliance with the System Agreement, a FERC tariff, is peculiarly within the FERC's purview, the

LPSC is barred from determining whether the terms of the Agreement have been met. Conversely, the LPSC contends that its actions is not preempted by federal law because its Order is not in conflict with any federal law.

Was the LPSC Order Barred by Federal Preemption?

In determining whether a state regulation conflicts with the FERC's authority, courts have looked to the "filed rate doctrine," which was created by the United States Supreme Court in *Montana-Dakota Utilities Co. v. Northwestern Pub. Serv. Co.*, 341 U.S. 246, 71 S.Ct. 692, 95 L.Ed. 912 (1951). The doctrine states that *interstate* power rates filed with or fixed by the FERC must be given binding effect by state utility commissions when determining *intrastate* rates. *Montana-Dakota Utilities Co.*, 341 U.S. at 251-52, 71 S.Ct. at 695, 95 L.Ed. at 919. (Emphasis added). In *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 966, 106 S.Ct. 2349, 2357, 90 L.Ed.2d 943, 954 (1986), the Supreme Court explained the filed rate doctrine, stating:

> FERC clearly has exclusive jurisdiction over the rates to be charged . . . interstate wholesale customers. (Citations omitted). Once FERC sets such a rate, a State may not conclude in setting retail rates that the FERC-approved wholesale rates are unreasonable. A State must rather give effect to Congress' desire to give FERC plenary authority over interstate wholesale rates, and to ensure that the States do not interfere with this authority.

In this case, the LPSC recognized that the "FERC has exclusive jurisdiction over the issue of whether the System Agreement has been violated." *L.P.S.C. Order No. U-20925-G* at 20. Accordingly, the LPSC found that it lacks authority to review the reasonableness of ELI's 1996 MSS-1 overpayments or to order refunds of the same, contrary to the FERC's express refusal to order refunds. However, the LPSC noted that the FERC order did not consider whether the

Operating Committee's decision to use the ERS units in its calculations after August 5, 1997 is in compliance with the System Agreement. Thus, the LPSC concluded that it has "the authority to assess the prudence of ELI's decision to continue to accord MSS-1 treatment to ERS units subsequent to FERC Order No. 415 dated August 5, 1997." *Id.*

The LPSC based its determination upon an "exception" to the filed rate doctrine set forth in *Pike County Light & Power Co. v. Pennsylvania Public Utility Comm'n*, 77 Pa.Cmwlth. 268, 465 A.2d 735, 738 (1983). In that case, Pike County Light & Power Company ("Pike") was a subsidiary of Orange and Rockland Utilities, Inc., a New York State operating utility. Pike's power supply was provided by the parent company through a FERC-approved Power Supply Agreement. Pursuant to an investigation of a proposed supplement to the Agreement/tariff, an administrative law judge concluded that Pike's reliance on the parent company as a source of power represented an abuse of management discretion in consideration of available, alternative, more economical, supplies of electricity. Accordingly, the administrative law judge submitted a recommendation to the Pennsylvania Public Utility Commission reducing Pike's purchased power expense, which resulted in a revenue increase in an amount less than the amount sought in the proposed tariff supplement. The Public Utility Commission adopted the administrative law judge's findings and conclusions, and Pike appealed, arguing that the Public Utility Commission order was barred by federal preemption.

The Pennsylvania court held that, in setting retail rates, a state commission retains power to consider and reject the "wisdom" of a utility company's contract to purchase interstate power at wholesale, even in situations in which the FERC, in setting the wholesale rate, has already found the terms of the interstate arrangement just and reasonable. The court reasoned that while the FERC has exclusive statutory

jurisdiction to set just and reasonable rates, a determination of the *prudence* of the utility company's decision to purchase power from a particular source is not exclusively within the FERC's jurisdiction. Therefore, the court concluded, the filed rate doctrine does not limit the jurisdictional and regulatory authority of a state commission to review a utility's decision to purchase power at a higher (albeit FERC-approved) price, where there are alternative sources of power at a lower price than the FERC-approved price. The court stated:

> The FERC does not analyze [the subsidiary utility company's] cost of service data or purchased power alternatives in making its determination. The FERC focuses on [the parent utility company] to determine whether it is just and reasonable *for that company to charge* a particular rate, but makes no determination of whether it is just and reasonable *for [the subsidiary] to incur* such a rate as an expense. The [Public Utility Commission], on the other hand, has no jurisdiction to analyze [the parent company's] cost of service data and makes no determination as to the reasonableness for [the parent company] to charge its rates. The [Public Utility Commission] focuses on [the subsidiary] and its cost of service data to determine whether it is reasonable for Pike to incur such costs in light of available alternatives. So while the FERC determines whether it is against public interest for [the parent company] to charge a particular rate in light of its costs, the [Public Utility Commission] determines whether it is against the public interest for [the subsidiary] to pay a particular price in light of its alternatives. The regulatory functions of the FERC and the [Public Utility Commission] thus do not overlap, and there is nothing in the federal legislation which preempts the [Public Utility Commission's] authority to determine the reasonableness of a utility

> company's claimed expenses. In fact, we read the Federal Power Act to expressly preserve that important state authority.

Id. at 738.

Moreover, in *New Orleans Public Service, Inc. v. The Council of the City of New Orleans*, 491 U.S. 350, 109 S.Ct. 2506, 105 L.Ed.2d 298 (1989), the New Orleans Public Service, Inc. ("NOPSI"), along with three other operating companies, was a wholly owned subsidiary of a parent company, Middle South Utilities. Each of the operating companies agreed to finance the construction of a new nuclear power plant. Subsequently, a controversy arose over the percentage of each company's share of the construction costs. After a review, the FERC held the NOPSI liable for 17 percent of the costs. NOPSI then applied to the New Orleans City Council, the local ratemaking authority, for retail rate increases designed to pass on to retail customers NOPSI's share of the cost of the nuclear plant. The City Council entered an Order, disallowing some of the rate increase, asserting that NOPSI had negligently incurred the costs. NOPSI sought injunctions in federal and state court to prevent the City Council's Order from taking effect, arguing that the City Council's Order was preempted by federal law.

The federal district court and court of appeal abstained from entertaining the federal injunction, finding that the existence of a state court suit on the same issue required federal abstention. The United States Supreme Court reversed, holding that federal abstention was not required. Although the Court did not address the issue of whether NOPSI's actions subsequent to the FERC order violated the filed rate doctrine, it remanded the case, stating:

> The Council has not sought directly to regulate interstate wholesale rates; nor has it questioned the validity of the FERC-prescribed allocation of power within the Grand

> Gulf system, or the FERC-prescribed wholesale rates; nor has it reexamined the prudence of NOPSI's agreement to participate in [the construction of the power plant] in the first place. Rather, the Council maintains that it has examined the prudence of NOPSI's failure, after the risks of nuclear power became apparent, to diversify its supply portfolio, and that finding that failure negligent, it has taken the normal ratemaking step of making NOPSI's shareholders rather than the ratepayers bear the consequences. Nothing in this is directly or even indirectly foreclosed by the federal statute, the regulations implementing it, or the case law applying it.

491 U.S. at 367, 109 S.Ct. at 2517-18, 105 L.Ed.2d at 316.

On remand, the federal district court held that the City Council's Order was not "facially" preempted by federal law.[8] The federal Fifth Circuit Court of Appeal affirmed, agreeing that the City Council's Order was not preempted by the FERC's Order. The appellate court reasoned that the City Council did not challenge the validity of the FERC's allocation, but merely imposed the consequences of NOPSI's failure to diversify its supply portfolio on NOPSI, rather than

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[8] The federal district court stayed the federal action because the state court had entered judgment in the City Council's favor. In the state court proceedings, the state district court denied the injunction, finding that the Order did not conflict with federal law. The state appellate court affirmed, stating:

> The Council's order on its face, does not violate any express law. In fact, as an administrative ruling, the order is itself akin to law. Moreover, the order specifically provides that it does not intend to affect wholesale ratemaking, which is preempted by federal law, or to undermine the FERC allocation of [the nuclear power plant] power and costs.
>
> The court of appeal expressly declined to address the issue of whether the City Council's Order was preempted by federal law, making it clear that it was deciding the issue of whether an injunction was appropriate.

on its customers. *New Orleans Public Service, Inc. v. The Council of the City of New Orleans*, 911 F.2d 993 (5th Cir.1990).

In the case *sub judice*, like the New Orleans City Council, the LPSC is not attempting to regulate interstate wholesale rates. Nor has the LPSC challenged the validity of the FERC's declination to order refunds of amounts paid in violation of the System Agreement prior to the amendment. Additionally, the LPSC has not challenged ELI's decision to participate in the Agreement. Rather, the LPSC has merely examined the prudence of ELI's failure to make steps to minimize its MSS-1 payments after the effective date of the amendment to Section 10.02 of the System Agreement. There is nothing in the federal statutes or case law that prohibits the LPSC from assessing the prudence of ELI's actions.

Furthermore, the FERC's determination encompassed treatment of the ERS units *prior to* the effective date of the amendment. The FERC refused to order refunds and approved the amendment to Section 10.02 of the System Agreement. The FERC never ruled on the issue of whether ELI's decision to continue to include the ERS units is a prudent one. Nor did the FERC determine whether ELI must continue to make overpayments to the other Entergy operating companies. Also, the FERC did not make it mandatory for the companies to include the ERS units in its MSS-1 calculations. For these reasons, we hold that the LPSC is not precluded from assessing the prudence of ELI's decision to continue to include the ERS units in its calculations for MSS-1 payments.

Was the LPSC Order Arbitrary or Capricious or Clearly Erroneous?

ELI further contends that the LPSC's actions were arbitrary and capricious. As stated above, a reviewing court may reverse the LPSC's ruling if it finds that the Commission's

ruling was arbitrary or capricious or clearly erroneous. *See Entergy Gulf States, Inc. v. Louisiana Pub. Serv. Comm'n*, 00-0336 (La.9/1/00), 766 So.2d 521; *Entergy Gulf States, Inc. v. Louisiana Pub. Serv. Comm'n*, 98-1235 (La.4/16/99), 730 So.2d 890.

As the LPSC pointed out, ELI had two options: (1) continuing to treat the ERS units as available upon meeting the criteria set forth in the amended Section 10.02; or (2) treating the units as unavailable. ELI elected to continue to include the ERS units and pass on the increased costs to its customers in the form of higher retail rates. The LPSC concluded that ELI acted imprudently and determined that ELI, not Louisiana rate payers, should bear the consequences of its decision.

Additionally, the LPSC found that Entergy's Operating Committee did not "exert due diligence in ascertaining the costs and benefits of bringing the ERS units back to service" when it made the decision regarding the availability of the ERS units. The record supports that conclusion. As the LPSC noted, the information that Turner presented to the Operating Committee contained no analysis of the costs and benefits of returning the units to service. Furthermore, the record indicates that no efforts were made to determine when or if the units would be needed. The record is devoid of any attempt by ELI to minimize its costs. Accordingly, we find that the LPSC's finding that ELI acted imprudently by failing to minimize its costs was not arbitrary or capricious and was supported by the evidence.

CONCLUSION

For the reasons set forth above, we hold that the LPSC is not precluded from assessing the prudence of ELI's decision to continue to include the ERS units in its calculations for

MSS-1 payments. We further hold that the LPSC's determination that ELI acted imprudently is supported by the record and is not arbitrary or capricious.

AFFIRMED.

LOBRANO and TRAYLOR, JJ., dissents.

KIMBALL, J., dissents and assigns reasons.

KIMBALL, J., dissenting.

The majority correctly notes that the System Agreement involved in this case is a FERC tariff. As amended by the FERC, it states in part that ERS units may be included in calculations for MSS-1 payments if certain conditions are met. The majority also points out that the LPSC recognized that the FERC has exclusive jurisdiction over the issue of whether ELI has violated the System Agreement. Even though it would be improper for the LPSC to determine that ELI did not meet the conditions and thereby violated the amended System Agreement when it included the ERS units, the LPSC asserts that its action is proper under its authority to assess the prudence of ELI's decision, citing *Pike County Light & Power v. Pa. Public Util. Comm'n*, 77 Pa.Cmwlth. 268, 465 A.2d 735, 738 (1983). In my view, the reason the LPSC found ELI's decision to be imprudent is because the LPSC found that ELI did not meet the conditions imposed in the amended System Agreement. I think that the LPSC is simply trying to do indirectly what it may not do directly, namely, determine that ELI violated a FERC tariff. For these reasons, I dissent.

APPENIDX B

A TRUE EXTRACT OF CIVIL COURT MINUTES

[Filed Mar 9, 2001]

Case No. 458,129 DIV. "D"

ENTERGY LOUISIANA

vs.

LOUISIANA PUBLIC SERVICE COMMISSION

Nineteenth Judicial District Court District Court,
Parish of East Baton Rouge, State of Louisiana,
Division "D," Honorable Janice Clark, Judge
Presiding, On Date of March 9, 2001.

This matter was previously heard on a petition for judical review filed on behalf of plaintiff, submitted to the Court, and by the Court taken under advisement.

In open court, the following oral reasons were dictated this date in this matter, "The Court has carefully reviewed this matter and is of the opinion that the Public Service Commission was neither arbitrary nor capricious in its finding that Entergy could not pass on the ELI overpayment to Louisiana consumers; nor was such ruling preempted by Federal Law and was not based on impermissible data. On the contrary, it was well within its constitutional and statutory authority. Therefore, the order of the Pubic Service Commission is upheld. Judgment to be signed accordingly." (D. Martin, Mon. 3-9-01)

I hereby certify that on this day a notice of the above judgment was mailed by me with sufficient postage affixed, to: [illegible]

Done and signed on 3-12-01

E. Knight
Deputy Clerk of Court

THIS DONE AND SIGNED AT BATON ROUGE, LOUISIANA THIS 9 DAY OF MARCH 2001.

/s/ E. Knight
DEPUTY FOR
Doug Welborn, Clerk of Court
Parish of East Baton Rouge
State of Louisiana

APPENDIX C

LOUISIANA PUBLIC SERVICE COMMISSION

ORDER NO. U-20925-G

LOUISIANA PUBLIC SERVICE COMMISSION, EX PARTE.

Docket No. U-20925-(Formula Rate Plan-1997) In re: Investigation of Louisiana Power & Light Company's rates, charges, services rendered and operations.

(Decided at Open Session held November 18, 1998)

NATURE OF PROCEEDING

The parameters of this Commission review of the revenue requirements for Louisiana Power and Light Company (subsequently termed Entergy Louisiana, Inc.) were established by Commission Order No. U-20925, dated June 15, 1995. Order No. U-20925 adopted a Formula Rate Plan, pursuant to which the Company was required to make annual filings, and rates would be subject to adjustment based upon the Company's filing and the Commission's review of that filing. Implementation of the Formula Rate Plan was pursuant to the Formula Rate Plan Rider (a copy of which is attached to Order No. U-20925 as Appendix I). Changes in rates which are not subject to disagreement amongst the parties become effective during the July billing cycle. Only matters in controversy proceed to hearing. Most of the ratemaking accounting issues in the Second Formula Rate Plan filing have been resolved by agreement amongst the parties. As a result of ELI's Second Formula Rate Plan filing, ELI's jurisdictional retail rates were reduced July 1, 1997 by $67,000,000. The parties have stipulated to a 10.5% rate of return on equity with retroactive application to July 1, 1997.

In the current proceeding, the parties have raised three issues: (1) whether gross or net proceeds of debt should be used in calculating the company's capital structure for ratemaking purposes; (2) whether payments under the System Agreement for the cost of generating units in Extended Reserve Shutdown should be included or excluded from ELI's revenue requirement; and (3) whether consideration should be given to whether the formula rate plan imposes a revenue cap or a rate cap.

JURISDICTION

The Commission exercises jurisdiction in this proceeding pursuant to Article 4, Section 21 of the Louisiana Constitution, and La. R.S. 45:1163(A)(1).

Louisiana Constitution, Article 4, Section 21 provides in pertinent part:

> The Commission shall regulate all common carriers and public utilities and have such other regulatory authority as provided by law. It shall adopt and enforce reasonable rules, regulations, and procedures necessary for the discharge of its duties, and shall have other powers and perform other duty as provided by law.

La. R.S. 45:1163 provides in pertinent part:

> A. (1) The Commission shall exercise all necessary power and authority over any street railway, gas, electric light, heat, power, waterworks, or other local public utility for the purpose of fixing and regulating the rates charged or to be charged by and service furnished by such public utilities.

Pursuant to the Formula Rate Plan ("FRP") adopted in Order No. U-20925, Entergy Louisiana Inc., ("ELI" or "the Company") made an annual filing on May 30, 1997 for the year 1997. On June 6, 1997, the commission received a letter of opposition from Louisiana Energy Users Group ("LEUG"),

opposing ELI's request for authorization to reflect accelerated recovery of certain cost components in the Company's next filed revenue requirements analysis.

During an open session held on June 10, 1997, the Commission ordered ELI to implement an undisputed rate reduction of $54,585,000 effective beginning with the first billing cycle on or after July 1, 1997, which rate decrease will be implemented and allocated in the same manner as the Commission allocated the previous rate decrease in this docket, i.e. on a base revenue contribution basis, an no portion of the rate decrease shall be applied to the interruptible or curtailable portion of any rate; the Commission also voted to deny ELI's Amended Motion for authorization to reflect accelerated recovery of certain cost components in the company's next filed revenue requirement analysis. The Commission allowed all parties an opportunity to file comments. The Commission instructed Special Counsel and Commission consultants to continue to investigate ELI's 1997 FRP filing.

On June 26, 1997, a revised "Rate Adjustments" schedule to ELI's Rider FRP was filed. On July 8, 1997, the Commission issued Consolidated Order No. U-20925-D, U-22092, regarding the decision made at the June 10, 1997 Business and Executive Committee; a Corrected Consolidated Order was issued on July 25, 1997. Motions for intervention out-of-time were filed by several corporations, including Alliance for Affordable Energy, Union Carbide Corporation and Marathon Oil Company. On October 2, 1997, a Notice of Status Conference and Notice of Proposed Intervention was issued by the presiding Administrative Law Judge. The report of that status conference, sent on October 22, 1997, notified all parties of the following procedural schedule: deadline of November 14, 1997 for filing parties' comments, and for Special Counsel's and Intervenors' testimony; November 24, 1997 deadline for ELI to file its responses to Special Counsel and Intervenor testimony; December 30, 1997 deadline for cross rebuttal testimony of Special Counsel

and Intervenors; January 20, 1998 deadline for Special Counsel's and Intervenors' rebuttal testimony; February 4, 1998 deadline for ELI's reply to Special Counsel and Intervenors' rebuttal; February 12, 1998 for filing Pre-Hearing Briefs, and hearing dates of the week of February 16, 1997. Parties filed documents and briefs pursuant to the above procedural schedule. A hearing was had in the matter on February 16-17, 1998. Parties filed Post-Hearing briefs on April 14, 1998, and at the request of the parties, Reply Briefs on May 20, 1998.

A Proposed Recommendation was issued by the Administrative Law Judge on July 8, 1998. The Exceptions to the Proposed Recommendation filed by Staff and ELI were received on July 23, 1998. On August 7, 1998, ELI and staff filed briefs in opposition to each other's Exceptions to the Proposed Recommendations

POSITIONS OF THE PARTIES

ELI and LSPC's special counsel stated in their Pre-Hearing briefs that a stipulation has been reached on all issues except the following two: (1) whether ELI should use gross or net proceeds of debt in the computation of its capital structure; and (2) whether ELI should be allowed to include costs of generating units in "Extended Reserve Shutdown" status ("ERS") in the calculation of the reserve equalization payments under service schedule MSS-1 of the Entergy System Agreement governing some transactions among the Entergy operating companies—i.e. whether these ERS units are "available" as defined in Section 10.02(a) of the Entergy System Agreement.

ELI argues that it is necessary to use net proceeds of debt in calculating the Company's capital structure in order to allow for the proper amount of recovery of capital costs, stating that the use of gross proceeds leads to insufficient recovery. According to ELI, the Company has only the

amount equal to the net, not gross proceeds to invest in rate base. Special Counsel argues to the contrary, that gross proceeds, not net proceeds of debt, should be used to compute the Company's capital structure. Special Counsel states that use of the gross proceeds methods allows for full recovery, not only of the principal amount of the debt, but also of the issuance costs associated with that debt. ELI's use of net proceeds, according to Special Counsel, artificially increases the equity portion of the capital structure, and hence unnecessarily increases the Company's revenue requirement.

ELI argues that the LPSC is precluded from considering overpayments to other operating companies under MSS-1 of the System Agreement and states that an order granting reduction in operating expenses as requested by Special Counsel would violate the filed rate doctrine, the supremacy clause and principles of *res judicata*, such a claim preclusion. In spite of its finding that Entergy violated the Systems Agreement, FERC declined to order a refund of overpayments under MSS-l. According to ELI, the issue, having therefore been considered and decided by a federal agency, is not amenable to Commission review. Special Counsel contends that since the overpayments resulting from the inclusion of units in Extended Reserve Shutdown in MSS-1 were made in violation of the FERC approved tariff, they should be removed from the ELI's revenue requirement; and that ELI's continued inclusion of ERS units in MSS-1 calculation is in violation of Amended Section 10.02, and hence should not be recovered from Louisiana ratepayers.

LEUG argues that Entergy Louisiana, Inc.'s generating units in extended reserve shutdown should not be included in the calculation of reserve equalization payments under Service Schedule MSS-1 of the Entergy System Agreement. In addition, LEUG raises the issue of whether under Commission Order No. U-10925, the FRP Rider filed by ELI should be amended to reflect that no rate increase under the

FRP Rider and/or relating to Waterford 3 may cause any ELI rate schedule to exceed the rates that were in effect on December 31, 1994.

ALJ RULINGS ON EXCEPTIONS TO THE PROPOSED RECOMMENDATION

The ALJ made the following ruling on the exceptions filed to the Proposed Recommendation: ELI excepts to the ALJ's recommendations on the issues of the use of net proceeds of debt in the company's capital structure and the MSS-1 treatment accorded to ERS units. Concerning the first issue, ELI's exceptions contain no new legal arguments, but merely reiterate that the use of gross proceeds does not allow full recovery of the company's capital costs. This issue has been addressed in the Proposed Recommendation in prior Commission proceedings, and in a FERC proceeding referred to in the Proposed Recommendation. ELI's reurging this argument as an exception does not warrant further discussion.

The Proposed Recommendation concluded that FERC Order No. 415, dated August 5, 1997, made it mandatory for ELI to make increased MSS-1 payments resulting from the MSS-1 treatment of ERS units, but that the FERC-mandated obligation ceased on August 5, 1997. Based on a finding that ELI failed to act prudently and minimize its costs when it *continued* to incur those increased costs after August 5, 1997, when they became optional, the ALJ recommended that the costs incurred *after* August 5, 1997 be disallowed, and that the payments made *before* that due date mandated by FERC should not be altered by this Commission. ELI excepted to this recommendation of a prorated disallowance of ERS payments made by ELI after August 5, 1997, by characterizing the recommendation as displaying parochial interest and misapprehending the law. [Page 2 of ELI's exceptions]. This exception was based on ELI's conclusion that the recommendation would interfere with ELI's FERC-mandated MSS-1 payments.

These conclusions, stated as exceptions, seem incognizant of the basic premise, explicitly stated in the Proposed Recommendation that under the facts and circumstances described in the instant case, this Commission cannot alter a FERC-prescribed obligation. This issue raised in ELI's exceptions, and more specific ones, are discussed in the Proposed Recommendation. ELI is referred to pages 20-37 of the Proposed Recommendation (included in its entirety in this Order under the section on ERS units), addressing: preemption; the delineation of the respective jurisdictional authority of FERC and this Commission; the extent of ELI's obligation under the FERC order; and this Commission's authority to scrutinize ELI's prudence in incurring costs *not* mandated by FERC. A prorated disallowance does not interfere with the FERC-set MSS-1 payments, as explained at length in the Proposed Recommendation.

The Administrative Law Judge adopted the suggestion made by the LPSC Staff in its Exceptions regarding the computing of the time period for the disallowance. As explained above, the ALJ recommended a prorated disallowance of the increased MSS-1 costs incurred after August 5, 1997, and initially recommended that 148/365 of such increased payments be disallowed. This ratio was arrived at based on a calendar test year, where 148 days corresponded to the number of days in a calendar year starting August 6, 1997.[1] Staff points out that pursuant to the provisions of the Formula Rate Plan, adjustments required under the Formula Rate Plan shall be effective as of July 1 of the year in which the filing is made. (Formula Rate Plan

[1] The calculation of test year expenses, and not the effective date of Commission-ordered adjustments, is based on the calendar year under the FRP Rider. The FRP Rider states that the "Evaluation Period", ends on December 31 of the test year.

Rider Schedule FRP §§ 2.B, 2.C).[2] Under Sections 2.B and 2.C of the Rider Schedule FRP, the ERS overpayments is a disputed issue; if the Commission resolves a disputed issue by ordering a Rate Adjustment, then "the final Rate Adjustments shall also reflect the adjustments necessary to recover or credit the estimated revenue [overcollection], that would have resulted had the final Rate Adjustments been implemented initially".[3] Thus, the adjustments made pursuant

[2] Section 2.B of the Rider provides:

> ". . . . the Rate Adjustments filed under the provisions of Section 2.A above, or such corrected Rate Adjustments as may be determined pursuant to the terms of this Section 2.B shall, after verification by the Commission, become effective for bills rendered on and after the first billing cycle of July of the filing year. Those Rate Adjustments shall then remain in effect until changed pursuant to the provisions of this Rider."

Section 2.C, entitled "Resolution of Disputes" provides:

> ". . . . If a dispute is resolved such that there are changes in the Rate Adjustments initially implemented that year pursuant to the above provisions, a revised Attachment A containing such further modified Rate Adjustments shall be submitted to the Commission by LP&L within five days of the Commission's order resolving the dispute. *In addition to reflecting the Commission's ruling on the disputed issues, the final Rate Adjustments shall also reflect the adjustments necessary to recover or credit the estimated revenue increase or decrease, respectively, that would have resulted had the final Rate Adjustments been implemented initially.* Such modified Rate Adjustments shall then become effective for bills rendered on and after the fifth day following the date on which the final rate adjustments are submitted, and shall remain in effect until superseded by Rate Adjustments established in the subsequent Evaluation Report filing."

[3] Section 2.C provides, however, that "[d]isputed issues shall be decided by the Commission, which shall render a ruling on such disputed issues *on or before August 31 of the filing year*". Therefore, this provision contemplates that the Commission will issue a ruling on the ERS overpayment issue on or before August 31, 1997. But pursuant to the procedural schedule in this proceeding agreed to by all parties, including

to an order in this proceedings would become effective July 1, 1997.

Based on this information on the effective date of July 1, 1997, for the adjustments under the 1997 Formula Rate Plan order, the 148/365 ratio suggested in the Proposed Recommendation as a method for prorating the disallowance of increased MSS-1 costs should be modified. All costs incurred by ELI *on or after August 6, 1997*, as a result of the continued MSS-1 treatment of ERS units are disallowed, and will be removed from the company's calculation of its cost of service, to be credited back to the ratepayers. As the rate-effective period commences July 1, 1997, the disallowance should be 329/365. Under Sections 2.B and 2.C of the Rider, all Commission-ordered adjustments in this proceeding are made effective for the period of July 1, 1997 through June, [sic] 30, 1998. [See Sections 2.B and 2.C on p.2 and "Effective Date and Term" at p. 5 of the FRP Rider.]

ELI, in Its Memorandum in Opposition to Staff's Exceptions to the Proposed Recommendation, argues that Staff's position in favor of a post-test year adjustment on the ERS units issue in this proceeding contradicts Staff's position in other proceedings against post-test year adjustments. ELI introduces this argument based on portions of sworn testimony in the Stranded Cost proceeding by Mr. Kahal, Staff expert witness, where he recommends that earnings be "calculated on a historical basis, with no 'negative attrition' adjustment" [ELI's "Memorandum in opposition to Staff's Exceptions, at p.2, citing Surrebuttal Testimony of Matthew I. Kahal of behalf of LPSC, June 1998, LPSC Docket No. U-20925(SC) at 13.] ELI further argues, in a footnote, that reference to sworn testimony in another case is permissible in

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ELI, the hearings in this matter did not commence until February, 1998. Thus, the Commission could not possibly have rendered a ruling on the disputed issue of ERS overpayments on or before August 31, 1997.

briefs and exceptions filed with the Commission, because the exceptions filed by Staff in Docket No. U-22092, Third Earnings Review, contain such references.

First, Mr. Kahal's testimony cited by ELI is not part of the evidence on record in this proceeding. Second, the fact that Staff may have cited sworn testimony of a witness in one proceeding in its exceptions filed in a different proceeding does not constitute a ruling by this Commission that such attempts to introduce evidence outside of the record in the current proceeding are "permissible".[4] The Commission made no such finding or ruling, having never addressed such an issue. Third, this Commission has the authority and the duty to decide whether post-test year adjustments are appropriate on a particular issue in a particular proceeding *based on the evidence on that issue in that proceeding*. The position of the Commission Staff on a different post-test year adjustment matter, expressed in another proceeding, are not binding on the Commission. The analysis below on ERS units addresses the issue of when post-test year adjustments are appropriate and why the evidence warrants an adjustment on the ERS issue in this proceeding.

Staff's Brief in opposition of ELI's Exceptions reiterates its exception concerning the issue of how the disallowance of ERS overpayments should be prorated and supports the Administrative Law Judge's conclusions on the issue of preemption.

This Commission finds that ELI's exceptions and Brief in opposition of Staff's exceptions do not warrant any

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[4] ELI had the opportunity to address this matter by mean of Exceptions and Briefs in Opposition to Staff's Exceptions in Docket No. U-22092, the docket where, according to ELI, Staff attempted to introduce sworn testimony from another proceeding. To raise that matter in this docket adds another layer of arguments based on evidence not on record in this proceeding.

modification to the ALJ's conclusion that the ERS overpayments made by ELI *on or after August 6, 1997* should be removed from the Company's cost of service and credited back to the ratepayers.

COMMISSION RULINGS

The Commission generally adopts the Final Recommendation of the Administrative Law Judge, with one exception. The Commission finds that the "net proceeds" of debt, rather than the gross proceeds, should be used in calculating the capital structure of ELI. Prior determinations the Commission in Entergy Gulf States cases are not binding in this case because, as stated by counsel for ELI in oral argument before the Commission, ELI uses a different method of computing its debt cost than is used by Entergy Gulf States. The Commission believes that the net proceeds method under the particular circumstances of this case will promote fairness.

1. GROSS V. NET PROCEEDS OF DEBT:

Contentions of the Parties

ELI's 1997 FRP filing uses the net proceeds of debt in computing the Company's capital structure. In other words, ELI deducts the costs it incurs in issuing debt, such as bond issuance costs, discounts and call premiums, from the gross proceeds it receives when it issues debt, and uses the "net proceeds", adjusted in the manner described herein, in calculating its capital structure. (In this proceeding call premiums account for almost all of the issuance costs [Tr. 2/16, Kahal at 14]). Special Counsel stated that, both in the 1996 FRP and in this proceeding, Staff did not contest the prudence of these issuance expenses, and in fact acknowledged that these costs should be recovered from the ratepayers. Where Special Counsel and ELI disagreed,

however, was the manner in which these figures should be used in reflecting the Company's capital structure.

The Company's Pre-Hearing and Post-Hearing Briefs stated that the use of gross proceeds leads to insufficient recovery, since the use of gross proceeds increases the debt portion and decreases the equity portion of the capital structure. According to the Company, where the net proceeds of debt are less than the gross proceeds, use of the gross proceeds method will always operate to deprive the utility of an opportunity to recover fully its actual capital costs, because the Company has only the amount equal to the net proceeds, and not the gross proceeds, to invest in rate base. The Company contended that the use of net proceeds is necessary to allow for full recovery of the debt issuance expenses. Special Counsel proposed that the actual amount of the debt (the "gross proceeds" of the debt) that appear in the Company's books should be used for purposes of computing capital structure, stating that this methodology allows a full recovery of all debt issuance and call premium expenses, via amortization, over the life of the new debt issuances. In Special Counsel's view, the full amount of the call premiums will be recovered from the ratepayers under this method; and until issuance costs are fully recovered by the Company, the Company should have an opportunity to earn a debt return on the unamortized balance of the costs. To assure this return, Special Counsel proposed to reduce the Company's debt balance by the amount of the unamortized call premiums for purposes of computing the embedded cost of debt, which, according to Special Counsel, his the result of raising the cost of debt with a concomitant increase in the Company's revenue requirement. The combination of these two procedures, Special Counsel argued, will ensure full recovery of all costs associated with debt issuances and also provide a return on the un-amortized balance of those costs.

Special Counsel contended that ELI's proposal of using net proceeds would have the effect of reducing the debt balance in the capital structure, which would artificially increase the equity portion of the capital structure. Since the rate of return on equity is higher than for debt, the Company's proposal, Special Counsel concluded, results in an increase in revenue requirement.

Special Counsel recommended that the Company's proposal should be rejected for the following reasons: First, Special Counsel's proposal of using gross proceeds would permit full recovery of all debt issuance costs, and no further recovery should be permitted or necessary. Second, in Order No. U-19904, the Commission rejected the use of "net proceeds" by ELI's sister company Entergy Gulf States Inc., and affirmed the ALJ's recommendation which stated:

> Gross proceeds are the amount of debt that actually appear on GSU's books as the principal amount outstanding of Gulf States' debt. Issuance costs are already recovered from the ratepayer is part of the cost of debt. [Direct, Baron, Ex. 1 at 24] Prior to the merger, GSU consistently employed, and the Commission recognized gross proceeds of debt. Use of net proceeds would substitute, in an amount equal to the issuance cost, equity for debt in GSU's capital structure, and thereby increase the Company's return on investment. What took place was not, as use of net proceeds would suggest, the issuance of stock, but rather it was financed as part of the debt issuance. Since the cost of equity is higher then the cost of debt, treatment of the issuance cost in effect as equity would be to the shareholder's benefit and would increase the cost to ratepayers.
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> [Order No. U-21485 dated October 4, 1996 at 16.]

Mr. Kabal, LPSC consultant, was questioned regarding the basis of his recommendation to use the gross proceeds of debt

in computing capital structure, and he replied that while he had not done a formal survey, his understanding was based on fifteen years of testifying on rate of return issues in federal jurisdictions, in several dozen state jurisdictions and in excess of one hundred cases. In each of the cases that Mr. Kahal participated in, the use of the face amount of the debt was the normal basis for capital structure in ratemaking. He stated that he saw no indication in any of the finance texts that he had occasion to consult that net proceeds instead of gross proceeds should be used in capital structure. [Tr. 2/16, Kahal at 16]

Staff also cited a recommendation by a FERC ALJ in Docket No. ER95-1042-000, which reached a similar conclusion and rejected the use of gross proceeds in capital structure by a sister company of GSU.

Special Counsel finally argued that this matter has been litigated twice before this Commission in Orders U-21485 and U-19904 (rate reviews of Entergy Gulf States, ELI's sister company), settled by the Commission, and affirmed on appeal; therefore, the issue should be put to rest and the Commission should reject the use of net proceeds, consistent with its prior orders.

Findings of Fact

1. A utility's cost of capital is the weighted average of the utility's cost of common equity, debt, and preferred stock.

2. The weighted average cost of capital is then applied to the Company's rate base to determine the dollar amount of the return that the Company will be permitted to earn to cover its cost of capital.

3. A utility's capital structure for ratemaking purposes should generally reflect the relative portion of each type of capital.

4. It is assumed, for ratemaking purposes, that generally the various types of capital are invested in rate base in the same proportions as they are available to invest in rate base. [Tr. 2/16, Kahal at 20]

5. The cost of equity is higher than the cost of debt.

6. "The optimal capital structure or the debt capacity for a firm just balances investors' and consumers' interests. While the investor is made less secure as the debt level rises, the consumers' gain more than offsets this disadvantage up to the debt capacity of the utility." Howe, Keith M. And Eugene F. Rasmussen, *Public Utility Economics and Finance*. Prentice-Hall, New Jersey, 1982, p. 103.

7. ELI's 97 FRP filing was made using the net proceeds of debt methodology.

8. The net proceeds of debt methodology utilizes the principal amount of debt net of the cost of issuing the debt or other financial costs.

9. Staff argues that the gross proceeds of debt, rather than the net proceeds of debt, is the proper amount to include in the Company's cost of capital.

10. The gross proceeds of debt represents the face amount of the debt, that is, the principal which the lender is expecting to be repaid.

11. ELI incurs certain costs associated with the issuance of debt, such as issuance costs, discounts, or call premiums.

12. No party to this proceeding has challenged the recovery of these costs from the ratepayer by inclusion in the Company's Revenue Requirement.

13. The gross proceeds methodology provides for the recovery of these expenses in two ways: (1) an annual amortization is added to interest expense; (2) In addition,

for embedded cost of debt calculation purposes, the debt balance is reduced by the unamortized balance, further raising the debt return.

14. The Company recovers all of the call premiums and other debt related expenses plus a debt return on the unamortized balance, until recovered. [LPSC Staff Ex. # 2 at 6]

15. The gross proceeds method fully compensates the Company for all the issuance costs it incurs.

16. Use of the gross proceed method has been adopted by the Commission for another Entergy company, Entergy Gulf States, Inc. In Order No. U-21485, *In Re Annual Monitoring of Gulf States Utility Company's Louisiana Jurisdictional Revenue Requirement Study Under Terms of the Joint Regulatory Proposal Set Forth in Appendix I to Commission Order No. U-19904* (October 4,1996)

17. The Commission's decision to use the gross proceeds methodology was affirmed by the Nineteenth Judicial District Court in *Entergy Gulf States, Inc. v. Louisiana Public Service Commission*, No. Ex: Commission, No. 432,745 (19th JDC, 1998).[5]

18. In a recent proceeding before the Federal Energy Regulatory Commission, the FERC Administrative Law Judge adopted the gross proceeds methodology. *System Entergy Resources, Inc.* Docket No. ER 95-1042-000 76 FERC ¶63,001 (1996)

Legal Analysis

For the purpose of this proceeding involving Entergy Louisiana, Inc., the Commission will adopt the net proceeds method of treating debt cost in determining the capital

[5] Entergy has filed an appeal to the Louisiana Supreme Court of the 19th JDC's ruling.

structure. As counsel for Entergy Louisiana explained in the oral argument before the Commission, ELI does not use the "yield to maturity" method of determining debt cost, as is used by Entergy Gulf States, Inc. Also, counsel for ELI represented that the net proceeds method historically has been used to determine ELI's capital structure. Thus, this case is distinguishable from the Commission's rulings in Entergy Gulf States cases. The Commission finds that the net proceeds method is a fair basis to determine the capital structure for ELI.

2. GENERATING UNITS IN EXTENDED RESERVE SHUTDOWN (ERS) STATUS:

Background

The dispute between the parties on this issue involves the Entergy System Agreement, a FERC-approved tariff that governs certain transactions between the Entergy operating companies. Pursuant to the terms of this tariff, each operating company shares in the costs of the total Entergy system generating capacity based on its own peak demand requirements relative to those of other operating companies. Schedule MSS-1 of the Agreement, set forth in section 10 of the System Agreement, provides the mechanism by which each operating company makes or receives payments based on whether the capacity it owns exceeds, equals or is less than the system capability for which it is responsible. Schedule MSS-1 purportedly equalizes the system reserves bourne by each operating company.

Prior to August 5, 1997, in order to be counted as a part of a company's capability for determining MSS-1 payments, a generating unit had to be "available" for use by the system, as defined in Section 10.01(a) of the Agreement:

> A unit is considered available to the extent the capability can be demonstrated and (1) is under the control of the System Operator, or (2) is down for maintenance or nuclear refueling. A unit is considered unavailable if, in the judgment of the Operating Committee, it is of insufficient value in supplying system loads because of (1) obsolescence, (2) physical condition, (3) reliability, (4) operating cost, (5) start-up time required, or (6) lack of due-diligence in effecting repairs or nuclear refueling in the event of a scheduled or unscheduled outage.

On January 1, 1987, several years after the execution of the System Agreement, the Extended Reserve Shutdown ("ERS") Program was conceived, which allowed the operating companies to place generating units in an inactive status in order to reduce costs by reducing operating staff, maintenance costs, and deferring the costs of repairing units. Since the inception of the ERS program, Entergy included the units in ERS status, including units that do not meet the above definition of available, as if they were "available" within the meaning of Section 10.02 of the System Agreement, for purposes of calculating the Entergy Operating Companies' capability under MSS-1.[6]

In a proceeding involving the inclusion of ERS units in MSS-1 calculations before the Federal Energy Regulatory Commission (*Entergy Services, Inc. and Gulf States Utilities Company*, 70 FERC ¶ 63,018 (1995)), the following issues were addressed by the presiding ALJ: (1) Did Entergy, in fact, violate the System Agreement?; (2) Assuming a violation of the System Agreement, what remedy, if any, is appropriate?; (3) Assuming a violation of the System Agreement, what is the dollar amount of such violation for the entire period that the violation occurred?; (4) Should Service Schedule MSS-1 of the System Agreement be

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[6] *Entergy Services Inc. and Gulf States Utilities Company*, (Opinion No. 415), 80 FERC ¶ 61,197 (8/5/97), Slip Op. at 3-5

amended prospectively to address expressly the ERS issue, and if so, how?[7]

The FERC Administrative Law Judge's conclusion in that proceeding that "the language of the System Agreement permits Entergy to include generating units in Schedule MSS-1 calculations only to the extent that such units are available, that the ERS units were not available under Schedule MSS-1, and that the inclusion of ERS units in the Schedule MSS-1 calculation was a violation of the System Agreement" was affirmed by the full FERC on appeal, in *Entergy Services, Inc. and Gulf States Utilities Company*, (Opinion No. 415), 80 FERC ¶ 61,197 (August 5, 1997).[8] In affirming the ALJ's determination, the FERC stated that "the System Agreement does not afford the Entergy Operating Committee broad, unfettered discretion to decide which units should be eligible for inclusion in Schedule MSS-1 computations".[9]

In considering the ALJ's recommendation, the FERC made the following findings: (1) Entergy violated the System Agreement by treating units in ERS status as available within the meaning of Section 10.02; (2) however, *as among the Entergy operating companies*, no refunds of overpayments made as a result of such violation was necessary; (3) since no refunds were deemed necessary, it was unnecessary to quantify the amounts to be refunded; (4) a prospective amendment to Section 10.02, as proposed by various parties in an Offer of Settlement, would adequately remedy the violation.

That FERC Order (Order No. 415 dated August 5, 1997), also approved a prospective amendment of Section 10.02 of

[7] *Id.*, at 5

[8] *Id.*, at 12

[9] *Id.*

the System Agreement, "effective as of the beginning of the first complete billing cycle following the date of issuance of this order".[10] Section 10.02, as amended, providers, in pertinent part:

> A unit is considered available to the extent the capability can be demonstrated and (1) is under the control of the System Operator, or (2) is down for maintenance or nuclear refueling, or (3) is in extended reserve shutdown (ERS) with the intent of returning the unit to service at a future date in order to meet Entergy System requirements. The Operating Committee's decision to consider an ERS unit to be available to meet future System requirements shall be evidenced in the minutes of the Operating Committee and shall be based on consideration of current and future resource needs, the projected length of time the unit would be in ERS status, the projected cost of maintaining such unit, and the projected cost of returning the unit to service.

Contentions of the parties

ELI's 1997 rate filings, which are the subject of this proceeding, include the payments made by ELI to the other operating companies under MSS-1 of the System Agreement as part of the operating expenses for the test year of 1996. Special Counsel for the Commission contended that: (1) since the overpayments resulting from the inclusion of units in ERS status in MSS-1 were made in violation of the FERC tariff, they should be removed from the 1996 test year operating

[10] The FERC Order provides that, "Schedule MSS-1 is hereby amended, *effective as of the beginning of the first complete billing cycle following the date of issuance of this order*, to clarify the treatment of ERS units as provided in the Offer of Settlement." [Emphasis provided]. The parties have not introduced any evidence concerning when the first billing cycle following the issuance of FERC Order No. 415 began, nor has ELI suggested any effective date other than August 5, 1997, the date of that FERC Order.

expenses; (2) ELI's continued inclusion of ERS units in the MSS-1 calculation violates the amended Section 10.02, and such overpayments should not therefore be recovered from Louisiana ratepayers.

In anticipation of ELI's argument that Special Counsel's request would be barred by the filed rate doctrine, Special Counsel stated that the filed rate doctrine does not preclude the exclusion of these amounts from ELI's 1996 operating expenses because, under *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 106 S. Ct. 2349 (1986), "[t]he filed rate doctrine ensures that sellers of wholesale power governed by FERC can recover the costs incurred by their payment of *just and reasonable FERC-set rates*". 106 S.Ct. at 2358.[11] Special Counsel reasoned that these overpayments were *not* "just and reasonable FERC-set rates", since they were made in violation of a FERC tariff, as confirmed by the FERC's finding that Entergy violated the System Agreement, by including ERS units in MSS-1 calculations. In Special Counsel's view, the FERC's decision not to order refunds *as among the Entergy operating companies* does not preclude a disallowance of charges paid in violation of a FERC tariff in a retail rate-making proceeding before this Commission.

In response to Special Counsel's first argument, ELI stated that an order by this Commission granting the reduction in operating expanses requested by Special Counsel would violate: (1) the filed rate doctrine; (2) the supremacy clause; and (3) principles of *res judicata*, such a claim preclusion. ELI contended that despite the finding that Entergy violated the System Agreement, the FERC refused to order a refund of those overpayments based on its finding that the violation did not result in unjust, unreasonable or unduly discriminatory rates. Therefore, ELI concluded, the filed rate doctrine would

[11] LPSC Post-Hearing Brief at 13-14, Emphasis provided by Special Counsel.

preclude any modification by this Commission of the payments to be made pursuant to that FERC Order.

ELI further argued that this Commission is without jurisdiction over issues of alleged violation of the System Agreement, as such allegations may only be properly brought before the FERC. ELI averred that Special Counsel's request to remove such overpayments from ELI's revenue requirements is a collateral attack on the FERC Order. Finally, according to ELI, principles of *res judicata*, such as claim preclusion, bar the resolution requested by Staff as the LPSC has once brought before the FERC, what according to ELI is the same issue arising from the same facts, and sought the same relief. Therefore, ELI argued, Staff may not seek resolution of an issue that has already been adjudicated by the FERC.

Special Counsel's second argument that those amounts should be removed from ELI's filings was based on an assertion that ELI has not complied with the new amended provisions of Section 10.02 of the System Agreement. Special Counsel stated that the evidence does not show that ELI or Entergy has any "plan" for returning these units to service as required by the amended provisions of Section 10.02, and hence the inclusion of units in ERS status does not comply with the amended System Agreement. Special Counsel stated that it sought data from ELI to demonstrate that these units would be returned to service and that it was more economic to return these units to service than to build new units or purchase power and energy outside the system, and that no such data was provided by ELI. [LPSC Staff Reply Brief at 10] Staff therefore argued that based on the evidence, the Commission should find that the inclusion of the units in ERS status in MSS-1 calculations is a continued violation of the System Agreement, and the resulting overpayments should consequently be removed from ELI's revenue requirement.

In support of its argument that ELI did not comply with the amended Section 10.02, Special Counsel directed this Commission to Mr. Turner's testimony on the Operating Committee's consideration of the issue of whether to continue to include all the 23 units in ERS status in MSS-1 payments. Special Counsel relied on the following facts testified to by Mr. Turner, the Secretary of the Operating Committee, to argue that the Operating Committee did not consider "current and future resource needs, the projected length of time the unit would be in ERS status, the projected cost of maintaining such unit, and the projected cost of returning the unit to service", as required by the amended Section 10.02: (1) At a meeting held in September 1997, Mr. Turner made a presentation to the Operating Committee, with information contained in a single sheet of paper showing the estimated cost of return to service of the ERS units including capital investment and five year operation and maintenance costs on a net present value basis;[12] (2) neither Mr. Turner nor his staff prepared any analyses of what it would cost to return the ERS units to service;[13] (3) Mr. Turner is not an engineer and would not have been qualified to perform any of the analyses concerning the cost to return these units to service [14]; (4) at the time of the meeting when the Operating Committee made its decision based on Mr. Turner's presentation, Mr. Turner had not seen any analyses or studies concerning what it would cost to retain the ERS units to service; [15] (4) Mr. Turner acknowledged that a study later conducted by Raytheon Engineers and Constructors, Inc. ("the Raytheon Study") was more detailed and reflected better estimates of the cost of

[12] Staff Reply Brief at 11, referring to ELI Ex # 14, KMT Ex. #1, p.8 of 10

[13] *Id.*, referring to Tr. 2/16/98 at 101-103

[14] Staff's Post-Hearing Brief at 17, citing Tr. 2/16/98 at 103

[15] Staffs Post-Hearing Brief at 17, Reply Brief at 12, citing Tr. 2/16/98 at 101

returning the ERS units to service; (5) in several instances the cost estimates contained in the Raytheon Study were more than twice as much as the estimates provided by Turner to the Operating Committee; [16] (6) The Raytheon study was not presented to the Operating Committee at its September 1997 meeting when it made the decision to classify these units as "available"; [17] (7) Mr. Turner could not give "a day, a week, a month, or even a year for any of these 24 [ERS] units . . . [or] a definite date when any of these units on this page [ERS units] will come out . . .";[18] (8) notwithstanding these admissions, Mr. Turner asserted that these units would be needed in the "relative near term", which he defined to mean "any time within the next 10 years." [19]

Based on these aspects of Mr. Turner's testimony, Staff concluded that: (1) the Operating Committee's decision to continue to include ERS units in MSS-1 calculations was based on unreliable information; (2) had the Committee had the more reliable estimates in the Raytheon Study that were more than twice as high as Mr. Turner's estimates in several cases, the Committee may not have found that the ERS units were economic to bring back into service. Therefore, Special Counsel argued, the Operating Committee's decision did not comply with requirements in the new Section 10.02, to consider "current and future resource needs, the projected length of time the unit would be in ERS status, the projected cost of maintaining such unit, and the projected cost of returning the unit to service".

Special Counsel also directed this Commission to the FERC's express statement in Order No. 415, in response to

[16] Staff Reply Brief at 12, citing Tr. 2/16/98 Confidential at 3-4, and LPSC Staff Exhibit Nos. 6 and 7

[17] Staff Reply Brief at 12 citing Tr. 2/16/98 at 106

[18] Staff Reply Brief at 10, citing Tr. 2/16/98 at 100

[19] Staff Reply Brief at 10, citing Tr. 2/16/98 at 101

LPSC's concerns that the amendment to the System Agreement did not "provide the Operating Committee with unfettered discretion". Special Counsel contended that ELI has exercised exactly the kind of unfettered discretion that the FERC Order assured this Commission the Operating Committee did not have, since ELI has not demonstrated through any evidence its "intent to return the units to service at a future date". Special Counsel noted that, in response to Special Counsel's request for data on ELI's plans to return the ERS units to service, ELI could not provide any specific dates or even a year when those units are anticipated to be returned to service; and that, while Mr. Turner acknowledged the same fact,[20] he nevertheless stated that the ERS units would be needed in the "relative near term", which he defined to mean "anytime within the next 10 years". Special Counsel argued that ELI's statement that these units would be needed anytime within the next 10 years, in light of its inability to provide anymore specific evidence is precisely the "unfettered discretion to decide which units should be eligible for inclusion in Schedule MSS-1 computations" that the FERC found the operating committee did not posses.

ELI challenged Special Counsel's second argument that the Company had failed to comply with the amended Section 10.02 on three distinct grounds: (1) according to ELI, Special Counsel has not shown that the Operating Committee's decision was not a good faith decision by ELI to continue to include the ERS units, which decision satisfied the criteria established by the FERC; [21] (2) Special Counsel's allegation that ELI has failed to comply with the amended System Agreement may only be properly brought before the FERC, insofar as the issue involves an interpretation of MSS-1, a FERC rate schedule; [22] (3) and finally, ELI argued that any

[20] Tr. 2/16/98 at 100

[21] ELI Post-Hearing Reply Brief at 24

[22] *Id.*

alleged violation of the August 5, 1997 amendment to the System Agreement cannot serve to reduce operating expenses for the test year of 1996, since post-test-year events may not be reflected in calculating test-year expenses.[23]

Other than its argument that the filed rate doctrine would not deprive this Commission jurisdiction because the MSS-1 payments was not "just and FERC-set rates" but actually violative of the FERC tariff[24], Special Counsel has not briefed the jurisdiction issue. However, Special Counsel continued to urge the removal of the MSS-1 payments from the 1996 test year expenses, and continued to allege a violation of the August 5, 1997 amendment to the System Agreement.

Findings of Fact

19. The Entergy System Agreement is a FERC-approved tariff that governs some transactions between the Entergy operating companies. Pursuant to the terms of this tariff, each operating company shares in the costs of the total Entergy system generating capacity based on its own peak demand requirements relative to those of other operating companies.

20. Schedule MSS-1 of the Agreement, set forth in section 10 of the System Agreement, provides the mechanism by which each operating company makes or receives payments based on whether the capacity it owns exceeds, equals or is less than the system capability for which it is responsible. Schedule MSS-1 purportedly equalizes the system reserves borne by each operating company.

[23] *Id.*, at 23-24

[24] This issue is not reached as the FERC in this instance made a particular ruling that in spite of the fact that the payments were made in violation of a FERC approved tariff, no refunds were necessary.

21. Prior to August 5, 1997, in order to be counted as a part of a company's capability for determining MSS-1 payments, a generating unit had to be "available" for use by the system, as defined in Section 10.02(a) of the Agreement:

> A unit is considered available to the extent the capability can be demonstrated and (1) is under the control of the System Operator, or (2) is down for maintenance or nuclear refueling. A unit is considered unavailable if in the judgment of the Operating Committee it is of insufficient value in supplying system loads because of (1) obsolescence, (2) physical condition, (3) reliability, (4) operating cost, (5) start-up time required, or (6) lack of due-diligence in effecting repairs or nuclear refueling in the event of a scheduled or unscheduled outage.

22. Several years after the System Agreement was executed, on January 1, 1987, the Extended Reserve Shutdown ("ERS") Program was conceived, which allowed the operating companies to place generating units in an inactive status in order to reduce costs by reducing operating staff, maintenance costs, and deferring the costs of repairing units.

23. Since the inception of the ERS program, Entergy treated unqualified units in ERS status as if they were "available" within the meaning of Section 10.02 of the System Agreement, for purposes of calculating the Entergy Operating Companies' capability under MSS-1. [*Entergy Services, Inc. and Gulf States Utilities Company*, (Opinion No. 415), 80 FERC ¶61,197 (8/5/97) (Slip Op. at 3-5)]

24. Such treatment of ERS units benefits companies such as Arkansas Power & Light, while it results in increased MSS-1 payment obligations to companies such as ELI and Mississippi Power & Light. [*Id.*, at 8]

25. LPSC sought refunds of $19.4 million plus interest for the period January 1, 1987 through December 31, 1993, and additional refunds for the post-1993 period, because the treatment of ERS units as available increased ELI's MSS-1 payment obligations by that amount. [*Id.*] [25]

26. FERC Order No. 415, dated August 5, 1997 found that the treatment of ERS units as "available" was in violation of the System Agreement.

27. In spite of FERC's ruling that the treatment of ERS units as "available" was in violation the System Agreement, FERC denied the refunds sought by LPSC and MPSC [*Id.*, at 14]

28. FERC's jurisdiction under 16 U.S.C.A. §824(a) over interstate wholesale rate makes these system-wide concerns relevant to FERC, whereas in regulating retail rates, system-wide benefits are not a predominant factor is regulating retail rates.

29. The FERC found the "there was no unjust enrichment as a result of the violation, *given that Entergy as a whole received no net gain* from the inclusion of ERS units in Schedule MSS-1; . . . Entergy's actions resulted *in system-wide benefits in the form of enhanced system efficiencies and cost reductions* that ultimately benefited ratepayers . . ." [*Id.*, at 14-15, Emphasis provided].

30. FERC's conclusions were based on system-wide concerns and not on the effect of the violation on any individual operating company's retail rates.

31. In fact, those system-wide benefits which increase ELI's operation expenses show that other sister companies are benefiting from the MSS-1 treatment of ERS units at

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[25] Mississippi PSC was another party in the FERC proceeding which sought refunds.

ELI's expense; such system-wide benefits that adversely affect ELI indicate that ELI might have simply acquiesced in the parent company's decision without regard to the impact of such increased expenses on its ratepayers in Louisiana, and to its obligation to minimize its cost of providing service.

32. In Order No. 415-A dated February 3, 1998, FERC denied LPSC and MPSC's request for rehearing.

33. Order No. 415-A simply denied rehearing, and therefore no new hearings were conducted. Hence, Order No. 415-A contains no new findings of facts for the period August 5, 1997 through February 3, 1998. It simply reaffirms Order No. 415 dated August 5, 1997.

34. Under FERC Order Nos. 415 dated August 5, 1997 and 415-A dated February 3, 1998, ELI has an obligation to pay its sister companies higher MSS-1 payments resulting from treating ERS units as "available" within the meaning of Section 10.02 for the period January 1, 1987 to August 5, 1997.

35. There exists no FERC Order or other federal regulation that makes it mandatory for ELI to treat ERS units as available after August 5, 1997.

36. ELI was put on notice by FERC's Order No. 415 that the MSS-1 treatment of ERS units was in violation of System Agreement and that it resulted in significantly higher MSS-1 payments that ELI must pay its sister companies.

37. ELI did not consider the effect of increased MSS-1 payments on its retail rates in Louisiana when it decided to continue the MSS-1 treatment of ERS units.

38. ELI failed to minimize its operating costs when it decided to continue its treatment of ERS units after August 5, 1997.

39. ELI failed to property weigh the costs and benefits *to its retail customers* of treating ERS units as available.

40. ELI's duty to incur prudent costs and avoid imprudent costs includes the duty to follow the criteria set forth in the amended Section 10.02 in reaching a decision regarding the availability status of ERS units after August 5, 1997.

41. The Operating Committee, which made that decision, did not have complete or accurate information before it regarding the cost of bringing ERS units back to service.

42. At a meeting held in September 1997, Mr. Turner made a presentation to the Operating Committee with incomplete information contained in a single sheet of paper showing the estimated cost of return to service of the ERS units including capital investment and five year operation and maintenance costs on a net present value basis. [ELI Ex.. # 14. KMT Ex.. # 1, p.8 of 10]

43. Neither Mr. Turner nor his staff prepared any analyses of what it would cost to return the ERS units to service. [Tr. 2/16/98 at 101-103].

44. Mr. Turner is not an engineer, and he would not have been qualified to perform any of the analyses concerning the cost to return these units to service [Tr. 2/16/98 at 103].

45. At the time of the meeting when the Operating Committee made its decision based on Mr. Turner's presentation, Mr. Turner had not seen any analyses or studies concerning what it would cost to return the ERS units to service [Reply Brief at 12, citing Tr. 2/16/98 at 101].

46. Mr. Turner acknowledged that a study later conducted by Raytheon Engineers and Constructors, Inc. ("the Raytheon Study") was more detailed and reflected better

estimates of the cost of returning the ERS units to service. [Tr. 2/16/98, Confidential at 5].

47. In several instances the cost estimates in the Raytheon Study were more than twice as much as in the estimates provided by Turner to the Operating Committee [Tr. 2/16/98 Confidential at 3-4, and LPSC Staff Exhibit Nos. 6 and 7].

48. The Raytheon Study was not presented to the Operating Committee at its September 1997 meeting when it made the decision to classify these units as "available" [Tr. 2/16/98 at 106].

49. Mr. Turner could not give "a day, a week, a month, or even a year for any of these 24 [ERS] units . . . [or] a definite date when any of these units on this page [ERS units] will come out . . ." [Tr. 2/16/98 at 100].

50. Notwithstanding these admissions, Mr. Turner asserted that these units would be needed in the "relative near term", which he defined to mean "any time within the next 10 years." [Tr. 2/16/99 at 101].

51. The evidence does not show that the Operating Committee made necessary efforts to ascertain that ERS units would be needed within the next 10 years.

52. The evidence does not show that the Operating Committee made efforts to reach a decision "based on consideration of current and future resource needs, the projected length of time the unit would be in ERS status, projected cost of maintaining such unit, and the projected cost of returning the unit to service".

53. Those MSS-1 payments that were made subsequent to the FERC Order dated August 5, 1997, were also known to the utility, or should be known to the utility to be unreasonable and imprudent, at the time those expenses were incurred (i.e. subsequent to the FERC order dated August 5, 1997)

54. The MSS-1 overpayments for the test year of 1996 are extraordinary expenses that are not likely to be incurred prospectively, in view of FERC's finding that they are in violation of the System Agreement.

55. The MSS-1 overpayments made after August 5, 1997 were imprudently incurred.

Legal Analysis

In determining whether all or any portion of the payments made by ELI pursuant to MSS-1 should be excluded from the 1996 test year expenses, this Commission first resolved the following issues:

a. Is this Commission precluded by FERC Order No. 415 from assessing the reasonableness of the payments made by ELI in 1996 pursuant to a FERC approved tariff?

b. May this Commission determine whether the Operating Committee's decision was in compliance with the amended Section 10.02 of the System Agreement?

c. Is this Commission precluded from removing those overpayment expenses from the 1996 test year expanses for purposes of setting ELI's rates for the year 1997?

d. Does this Commission have authority to assess the prudence of ELI'S management decision to continue to include the ERS units in MSS-1 calculations *after* the August 5, 1997 FERC Order?

e. If so, did the Company act prudently in continuing to accord ERS units MSS-1 treatment?

f. Should this Commission find that management decision imprudent, may the Commission deny recovery of all or a prorated portion of MSS-1 payments for purposes of setting ELI's rates for 1997?

A resolution of these above issues depends upon a proper analysis of the respective jurisdictional and regulatory authority of the FERC and this Commission. Such an analysis warrants a review of the issues resolved in the FERC orders in question and also of the "filed rate doctrine" as expounded in the case law.

Preemption under the "filed rate doctrine"

Federal law may preempt state law in three ways: first, Congress may expressly define the extent to which it intends to preempt state law; second, Congress may only signal an intent to occupy the area; third, state laws that conflict with federal laws are preempted, even if Congress has not expressly preempted them or otherwise signaled its intent to occupy the area. U.S.C.A. Const. Art. VI, cl 2. Absent conflicting federal legislation, the states may exercise police power over matters of legitimate local concern even though such regulation may affect interstate commerce. *Philadelphia v. New Jersey*, 437 U.S. 617, 623-24, 98 S. Ct. 2531, 2535, 57 L.Ed.2d 475 (1978). Incidental burdens on interstate commerce may be unavoidable when a state legislates to protect its citizens. *Id.*

Under 16 U.S.C.A. §824(b)(1), the FERC has jurisdiction over all facilities for the sale of electric energy at wholesale in interstate commerce[26]; "sale of electric energy at wholesale in interstate commerce" is defined in §824(d) as "a sale of electric energy to any person for resale". FERC has exclusive jurisdiction to determine "just and reasonable" rates for wholesale sales of electric power in interstate commerce. 16 U.S.C.A. §824d(a). However, the Federal Power Act limits federal regulation of electric utilities engaged in interstate commerce "to those matters which are not subject to regulation by the States". 16 U.S.C.A §824(a).

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[26] This jurisdictional authority is subject to limited statutory exceptions as provided in §824(b)(2) which exceptions see not applicable here.

Thus, Congress has not explicitly stated, or even signaled an intent to occupy the field; in fact, FERC's authority is limited to those matters as specified in the FPA, and is limited "to those matters not subject to regulation by the States." §824(a). Thus, under the FPA, states' regulatory authority is preempted only where state regulation conflicts with federal regulation.

The U.S. Supreme Court confirmed this limited preemptive effect of the FPA, when it stated that the FPA "had no purpose or effect to cut down state power. On the contrary, perhaps its primary purpose was to aid in making state regulation effective". *Panhandle Eastern Pipe Line Co. v. Public Service Com'n of Indiana,* 332 U.S. 507, 517, 68 S.Ct. 190, 195, 92 L.Ed. 128. The Fifth Circuit similarly stated that it must be assumed that state police powers were not to be superseded by Federal Power Act in the absence of clear and manifest congressional purpose. Federal Power Act §§321 et seq., as amended 16 U.S.C.A §§792 et seq., 791a, U.S.C.A. Const. Art. VI cl.2. *New Orleans Public Service, Inc., v. Counsel of City of New Orleans*, 911 F.2d 993, rehearing denied, certiorari granted 111 S.Ct 1617, 499 U.S. 974, 114 L.Ed.2d 715, certiorari dismissed 112 S.Ct 411, 502 U.S. 954, 116 L.Ed.2d 357.

In determining whether a state's regulation conflicts with FERC's authority, courts have used the "filed rate doctrine", stated as follows: In interpreting the extent of FERC's authority under this statutory grant of jurisdictional and regulatory power, "the right to a reasonable rate is the right to the rate which the [Federal Energy Regulatory] Commission files or fixes, and, . . . except for review of the Commission's orders, [a] court can assume no right to a different one on the ground that, in its opinion, it is the only or the more reasonable one." *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246, 251-252, 71 S.Ct. 692, 645, 95 L. Ed. 912 (1951).

In *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 106 S.Ct. 2349, 90 L.Ed.2d 943 (1986) the Court held that the filed rate doctrine precluded the State of North Caroline from setting retail rates that did not take into account FERC's allocation of power between two related utility companies; and similarly in *Mississippi Power & Light v. Mississippi Ex Rel. Moore*, 487 U.S. 354, 108 S.Ct. 2428, 101 L.Ed.2d 322, relying on *Nantahala*, the Court reversed a ruling by the Mississippi Supreme Court that FERC's allocation of a 33% share of the costs associated with a nuclear power plant to MP&L did not obligate the State to approve a pass-through of those costs to state consumers without a prudence review. In *Mississippi Power & Light, supra*, the Court stated:

> . . . States may not alter FERC-ordered allocations of power by substituting their own determinations of what would be just and fair. FERC-mandated allocations of power are binding on the States, and States must treat those allocations as fair and reasonable when determining retail rates.

Our decision in *Nantahala* relied on fundamental principles concerning the preemptive impact of federal jurisdiction over wholesaler rates on state regulation. First FERC has exclusive authority to determine the reasonableness of wholesale rates. . . . [The filed rate doctrine] binds both state and federal courts and is in the former respect mandated by the Supremacy Clause. 476 U.S., at 963, 106 S.Ct., at 2355. Second, FERC's exclusive jurisdiction applies not only to rates but also to power allocations that affect wholesale rates. *Id.*, at 966, 106 S.Ct., at 2356-2357. Third, States may not bar regulated utilities from passing through to retail consumers FERC-mandated wholesale rates. "The filed rate doctrine ensures that sellers of wholesale power governed by FERC can recover the costs incurred by

> their payment of just and reasonable FERC-set rates. When FERC sets a rate between a seller and a wholesaler-as-buyer, a State may not exercise its undoubted jurisdiction over retail sales to prevent the wholesaler-as-seller from recovering the costs of paying the FERC-approved rate . . . Such a 'trapping' of costs is prohibited."

Id., at 974, 106 S.Ct. at 2359.

Thus, the filed rate doctrine restricts state regulation of the electric utility industry in that, in regulating retail rates, states may not challenge federally approved wholesale rates as unreasonable, thereby "trapping" the federally approved costs incurred by the utility. This principle set forth in *Mississippi Power & Light* and *Nantahala* has been followed in several state court decisions. For example, in *Narragansett Electric Co. v. Burke*, 119 R.I. 559, 381 A.2d 1358 (1977), *cert denied*, 435 U.S, 972, 98 S.Ct. 1614, 56 L.Ed.2d 63, the Rhode Island Supreme Court held that the state regulatory commission could not review the reasonableness of FERC-approved wholesale rates and must treat the FERC rates as reasonable operating expenses when establishing a utility's costs of retail service. *Id.*, at 1363.

The Pike exception

An exception to the pre-emptive force of the filed rate doctrine, as enunciated in *Montana-Dakota Utilities, Inc.*, was crafted by a Pennsylvania court in *Pike County Light and Power Co. v. Pennsylvania Public Utility Commission*, 77 Pa. Cmwlth. 268, 463 A.2d 735 (1983), where it was held that despite FERC's exclusive jurisdiction to set just and reasonable rates, FERC "makes no determination of whether to *incur* such a rate as an expense." *Id.* 465 A.2d at 738. [Emphasis in original.] The *Pike* court reasoned that, while FERC has exclusive statutory jurisdiction under the FPA to set just and reasonable rates, a determination of the prudence

of the purchaser's decision to purchase power from this source is not exclusively within FERC's jurisdiction. Therefore, the court concluded, the filed rate doctrine does not limit the jurisdictional and regulatory authority of a state commission to review a utility's decision to purchase power at a higher (albeit FERC-approved) price, where there are alternative sources of power at a lower price than the FERC-approved price.

In *Nantahala*, the Court expressly acknowledged the *Pike* exception when it noted that in certain circumstances, a utility's purchase of a particular quantity of high cost power at FERC-approved rates might be unreasonable, if lower cost power were available from another source. *Nantahala*, 476 U.S. at 972, 106 S.Ct. at 2359, quoting from *Pike*. The Court determined, however, that this line of cases had no application where FERC has not only determined the (wholesale) rate but also the source and/or quantity of power to be purchased.[27]

The U.S. Supreme Court indirectly addressed this issue (in the context of the proper exercise of *Burford/Younger* abstention by a federal court) in *New Orleans Public Service, Inc., v. The Council of the City of New Orleans, et al.*, 491 U.S. 350, 109 S.Ct. 2506, 105 L.Ed.2d 298 (1989). Though the Court did not address the specific issue of whether the review by the Council of New Orleans (the local regulatory body) of NOPSI's prudence in a decision made subsequent to a FERC order violated the filed rate doctrine, the Court remanded the case, noting specifically that:

> The Council has not sought directly to regulate interstate wholesale rates; nor has it questioned the validity of the

[27] Of course, under *Pike*, even where the FERC mandates the quantity and/or source of power to be purchased, States will have jurisdiction to review the prudence of a utility's action where the quantity purchased exceeds that mandated by the FERC.

> FERC-prescribed allocation of power within the Grand Gulf system, or the FERC-prescribed wholesale rates; nor has it reexamined the prudence of NOPSI's agreements to participate in Grand Gulf 1 in the first place. Rather, the Council maintains that it has examined the prudence of NOPSI's failure, after the risks of nuclear power became apparent, to diversify its supply portfolio, and that finding that failure negligent, it has taken the normal rate-making steps of making NOPSI's shareholders rather than the ratepayers bear the consequences. Nothing in this is directly or even indirectly forclosed by the federal statute, the regulations implementing it, or the case law applying it.

Id., at 367, 109 U.S. 2518.

On remand, the Fifth Circuit, in *New Orleans Public Service, Inc., v. The Council of the City of New Orleans, et al*, 911 F.2d 993 (5th Cir. 1990), held that the filed rate doctrine did not preclude the Council from examining NOPSI's prudence in not acting to minimize its losses. The court's conclusion was based on its findings that the FERC did not assert jurisdiction to determine NOPSI's prudence in its lack of efforts to minimize its total cost exposure for the Grand Gulf project, and that the Council's resolution specifically provided that, in determining the appropriate retail rate increase, the Council would not seek to invalidate any of the agreements surrounding Grand Gulf 1 or to order NOPSI to pay the seller a wholesale rate other than that approved by FERC.

Several state courts and regulatory bodies have followed the reasoning in *Pike* and in the *NOPSI* cases, in allowing the State regulatory bodies this limited area of prudence review where the actions examined are not covered by the FERC resolution. *See Re FERC Order 636 Transition Costs*, 93-0328, Illinois Commerce Commission, 150 PUR 4th 181; *Alliance for Affordable Energy v. New Orleans*, 578 So.2d

949 (La.App. 4 Cir. 1991)[28]; and denying such authority where the particular action examined by the State regulatory agency has already been approved or mandated by FERC. E.g., *General Motors Corporation v. Illinois Commerce Commission*, 574 N.E.2d 650 (Ill. 1991); *Connecticut Light and Power Company v. Connecticut Department of Public Utility Control, et al.*, 148 PUR 4th 364 (Connecticut Superior Court, 1993); *Re Final Statement of Policy Regarding Recovery of Tare-or-pay Expenses*, 104 PUR4th 185 (1989); *Re Interstate Power Co.*, 103 PUR 4th 177 (1989); *Re Pennsylvania Power Co.*, 93 PUR 4th 359 (1988); *Re Costs Associated with Take-or-pay Charges*, 95 PUR 4th 5 (1988); *Kentucky West Virginia Gas Co. v. Pennsylvania Pub. Utilities Commission*, 837 F.2d 600 (3d Cir. 1988).

The Pike-exception has thus carved out a limited area where the filed rate doctrine or the supremacy clause does not deprive the States of their authority to examine the prudence of a regulated utility's actions, where such actions are not *mandated* by federal regulation (such as a FERC order or tariff), but are left to the discretion of the utility. Thus, a proper application of the *Pike* exception depends on whether the particular action of the utility scrutinized by the State regulatory body for reasonableness and prudence has already been approved/ mandated by FERC or whether it has been left to the discretion of the utility by FERC.

Application of the Law:

a. Is this Commission precluded from assessing the reasonableness of the MSS-1 payments made by ELI for the year 1996 pursuit to FERC Order No. 415?

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[28] On appeal, after a writ of certiorari was granted by the Louisiana Supreme Court, this case was vacated by the Supreme Court by virtue of a Consent Decree that was entered into by all parties. *Alliance for Affordable Energy v. The Council of the City of New Orleans*, 588 So.2d 89 (La. 1991). The merits of the decision by the 4th Circuit were not disturbed as the case was vacated upon a Joint Motion by all parties.

The instant case does not present one of the necessary elements of the filed rate doctrine, to wit, "FERC-approved or FERC-set rates", because the FERC indeed found that the inclusion of ERS units in MSS-1 calculation was in violation of Schedule MSS-1 of the System Agreement. Hence, this case can be distinguished from all the cases discussed above. This Commission's review of the case law on the filed rate doctrine has not disclosed any case where a State Commission was faced with the issue of a FERC finding that expenses have been incurred in violation of a FERC tariff. Nor have the parties cited any case addressing issues presented by such a factual situation. This issue therefore remains an open question.

However, in Order No. 415, FERC also found that the overpayments made by ELI as result of such a violation "did not result in an unjust, unreasonable or unduly discriminatory outcome in the circumstances". In other words, in a seemingly paradoxical manner, FERC has approved the results of what it found to be a violation of a FERC tariff. The FERC Order also approved the amendment to Section 10.02 of the System Agreement, which according to FERC, would sufficiently safeguard against future violations through continued inclusions of ERS units in MSS-1 calculations. The original FERC Order was dated August 5, 1997, and the Order denying rehearing, February 1998. ELI states that the amendment to Section 10.02 became effective August 5, 1997.[29] [ELI's Post-Hearing Reply Brief at 23-24]

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[29] The FERC Order, however, provides that, "Schedule MSS-1 is hereby amended, *effective as of the beginning of the first complete billing cycle following the date of issuance of this order*, to clarify the treatment of ERS units as provided in the Offer of Settlement." [Emphasis provided]. The parties have not introduced any evidence concerning when the first billing cycle following the issuance of FERC Order No. 415 began, nor has ELI suggested any effective date other than August 5, 1997, the date of that FERC Order.

Under 16 U.S.C.A. §824e(a), FERC has exclusive authority to determine whether "any . . . contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential . . ."; and under §824e(b) "the [FER] Commission may order the public utility to make refunds of any amounts paid . . . is excess of those which would have been paid under the just and reasonable rate, charge, . . . price of contract which the Commission orders to be thereafter observed and in force." In Order No. 415-A, the FERC explains that it has discretion in ordering refunds, which it exercised in Order No. 415 in rejecting claims for refund by appellants, including the LPSC. Therefore, under *Mississippi Power & Light* and *Nantahala*, this Commission lacks authority to review the reasonableness of ELI's 1996 MSS-1 overpayments or to order refunds of the same, contrary to FERC's express refusal to order such refunds imposing an obligation on ELI to make those payments. Such an inquiry by this Commission would violate the filed rate doctrine, supremacy clause and principles of *res judicata*, as ELI points out.

b. Is this Commission precluded from determining whether the Operating Committee's decision was in compliance with the amended Section 10.02 of the System Agreement?

LPSC Staff argues that the MSS-1 overpayments should be disallowed in this proceeding because the Operating Committee's decision violates the amended Section 10.02 of the System Agreement, a tariff filed with the FERC. Special Counsel thus invites this Commission to adjudicate the issue of whether ELI has violated a FERC-filed tariff. As ELI argues in its Post-Hearing and Reply briefs, this Commission is pre-empted from determining whether the terms of a FERC tariff have been met, for the issue of violation of or compliance with a FERC tariff is peculiarly within FERC's purview. Any allegation of a violation of a FERC-tariff should therefore be brought before the FERC.

However, (as will be discussed in the following subsections), if this Commission is not precluded from reviewing the *prudence* of the Operating Committee's decision to incur increased costs due to the treatment of units in ERS status, and should it find that decision imprudent, then it can disallow those increased costs resulting from such decision. In doing so, this Commission will not interfere with FERC's authority to judge Entergy's actions under the System Agreement, because, as will be discussed in detail below, FERC Order No. 415 dated August 5, 1997 does not address the reasonableness of ELI's actions subsequent to that date. Therefore, though FERC has exclusive jurisdiction over the issue of whether the System Agreement has been violated, there currently exists no FERC order that has found that the Operating Committee's decision is in compliance with the System Agreement. In the absence of such FERC determination, this Commission can scrutinize the prudence of the Operating Committee's decision without violating the supremacy clause insofar as that decision affects retail rates. (This Commission's authority to scrutinize ELI's decision to continue to accord MSS-1 treatment to ERS units will be discussed in the following subsections.)

This Commission also finds that in determining the prudence of ELI's decision subsequent to August 5, 1997, this Commission is neither limited to the criteria set forth in the amended Section 10.02, nor does it have to necessarily abstain from using those FERC-set criteria in examining ELI's actions. In addition to the well-established standards for judging prudence such as reasonableness, economy, impact on retail rates, duty to minimize cost of service, duty to avoid risk, etc., this Commission can also take judicial notice of the FERC-set standard for treating ERS units as available. ELI's duty, as a regulated utility, to incur prudent costs and avoid imprudent costs includes the duty to follow the criteria set forth in the amended Section 10.02 in reaching a decision regarding the availability status of ERS units after

August 5, 1997. Thus, the amended Section 10.02 may serve as an additional test for reasonableness and prudence in this Commission's review of ELI's MSS-1 expenses.

c. Is this Commission precluded from removing from the 1996 test year expenses the MSS-1 overpayments for purposes of setting ELI's 1997 rates?

ELI agues that removal of the MSS-1 overpayments for the 1996 test year in setting ELI's 1997 rates amounts to an order by Commission ordering refunds of those 1996 MSS-1 overpayments, and would constitute the prohibited "trapping" under *Mississippi Power & Light, supra.* [ELI Post-Trial Brief at 32, referring to Catlin's testimony].

However, FERC's Order No. 415 only addressed the issue of *refunds* of those overpayments, whereas rate-making is, by definition, *prospective. Bristol & Warren Gas Co. v. Burke*, 439 A.2d 246 (R.I. Sup. Ct 1981). There are two aspects of the issue currently before this Commission that FERC did not address or resolve, and those aspects are not foreclosed by the filed rate doctrine and the supremacy clause: (1) the validity of including MSS-1 payments made in 1996 in the calculation of test year expenses for purposes of setting rates for the year 1997-1998 (not for purposes of determining recovery of those very expenses incurred in the year 1996 via rates for 1996-1991); [30] and (2) subsequent to the FERC's pronouncement that the inclusion of ERS units in MSS-1 calculations was in violation of the System Agreement, the prudence of ELI's management decision to continue to incur the increased expenses of MSS-1 payments resulting from the inclusion of ERS units in calculating system capacity.

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[30] The rate-effective period for the implementation of the rates established in this proceeding, i.e. 1997 FRP, is July 1, 1997 through June 31, 1998. See the discussion on the rate-effective period provision under the FRP Rider under the section ALJ Rulings on Exceptions to the Proposed Recommendation, and footnotes 1-3 in that section.

With regard to the first issue (i.e. the validity of the inclusion of the MSS-1 payments made in violation of the FERC tariff as part of the test year expenses in setting rates for 1997-1998), though this Commission is bound by FERC's finding that the violation of the System Agreement did not warrant refunds, FERC's *did not order, prospectively*, that ELI and the other sister companies must continue to include ERS units in MSS-1 calculations, or that payments resulting from such continued inclusion are just and reasonable. To the contrary, FERC found that previous inclusion of ERS units under MSS-1 was in violation of the FERC-approved tariff, stated that the Company's discretion was not unfettered, and amended the tariff to provide some direction.

Thus, this Commission by the authority to disallow, for purposes of prospectively setting the rates for the year 1997-1998, the test year expenses of MSS-1 overpayments that FERC found were made in violation of the tariff, contrary to ELI's argument that post-test-year events may not be reflected in the calculation of test year expenses. (ELI's Reply Brief at 23-24). Such an adjustment to the test year is encompassed by the principles of "known and measurable" pro forma adjustments, and the exclusion of extraordinary or unusual expenses from test year expenses:

> Only prudent and efficient costs should be charged to the consumer. In other words, the consumer is responsible for the lowest cost of providing reasonable service, and no more. And the Commission is responsible for seeing that the consumer does not pay more. . . . . .
>
> The cost of service determined by a commission is to be representative of the conditions that will prevail when the rates will be effective; i.e., rate making is prospective. As a result, *pro forma* adjustments are made to the test year actual costs to represent more accurately prospective conditions.

> Another type of *pro forma* adjustment includes adjustments for abnormal and extraordinary revenues or costs. Abnormal levels of revenues and costs may be changed to normal levels. . . . To determine prospective rates, normal levels of sales, revenues, and costs would be included in the cost of service. Extraordinary costs are removed from the cost of service when costs are unlikely to be incurred prospectively. . . . To incorporate extraordinary costs would generate revenues unneeded in the future to cover actual costs incurred; a windfall profit would occur, a windfall profit not needed to cover costs.

Howe, Keith M. And Eugene F. Rasmussen, *Public Utility Economics and Finance*. Prentice-Hall, New Jersey, 1982, p. 74-75.

Contrary to ELI's assertion, post-test year adjustments to exclude non-recurring and unusual expenses from test-year operating expenses are encountered routinely in rate cases. e.g., *Re Idaho Power Co.*, 76 PUR 4th 326 (1986) (exclusion of computer lease cancellation payments from utility's test-year operating expenses as non-recurring); *Iowa-Illinois Gas & E. Co.*, 68 PUR4th 115 (1985) (post-test-year adjustment of expanses to reflect known and measurable changes in wages and medical insurance premiums); *Re Central Vermont Public Service Corporation*, 113 PUR4th 220 (1990) (prospective adjustment of prices of output and resources to reflect a known and measurable change); *In re: Annual monitoring of Gulf States Utilities Company's Louisiana jurisdictional revenue requirement study under terms of the Joint Regulatory Proposal set forth in Appendix 1 to Commission Order No. U-19904*, Louisiana Public Service Commission, Order No. U-22092 (adjustment of test-year cost savings expenditures which were found to be nonrecurring).

In this case, the MSS-1 payments made in violation of the FERC are unlikely to be incurred prospectively, especially

after FERC's own finding that MSS-1 treatment of ERS units is a violation of the tariff which increased ELI's MSS-1 expenses. Those MSS-1 payments that were made subsequent to the FERC Order dated August 5, 1997 were also known to the utility, or should be known to the utility to be unreasonable and imprudent, at the time those expenses were incurred (i.e. subsequent to the FERC order dated August 5, 1997). Thus, this Commission's decision to adjust the 1996 test year expenses to exclude the overpayments resulting from the MSS-1 treatment accorded to ERS units is consistent with the regulatory principles of adjusting for extraordinary and unusual expanses and for known and measurable changes in conditions that more accurately reflect the conditions that will prevail through the rate-effective period.

An adjustment by this Commission for extraordinary or imprudent expenses, so long as such adjustment does not make dual compliance impossible, would not violate the filed rate doctrine or the supremacy clause. It is also not *res judicata* since no determination was made by the FERC as to the prospective reasonableness of ELI's violation.

d. Does this Commission have authority to assess the prudence of ELI's management decision to continue to accord MSS-1 treatment to ERS units after August 5, 1997?

A court or agency must assume that state police powers were not to be superseded by Federal Power Act in the absence of clear and manifest congressional purpose. Federal Power Act §§321 et seq., as amended 16 U.S.C.A. §§792 et seq., 791a; U.S.C.A. Const. art. VI, cl.2. *New Orleans Public Service, Inc., v. Council of City of New Orleans*, 911 F.2d 993, rehearing denied, certiorari granted 111 S.Ct. 1617, 499 U.S. 974, 114 L.Ed.2d 715, certiorari dismissed 112 S.Ct. 411, 502 U.S. 954, 116 L.Ed.2d 357. It must also presume that state law is not pre-empted, as this is an area traditionally regulated by the states under their historic police power. *California v. ARC America Corp.*, 490 U.S. 93, 109 S.Ct.

1661, 104 L.Ed.2d 86 (1989). Congress' acknowledgment of States' authority over retail rates is expressly stated in §824(a). Thus, to the extent that this Commission's decision does not conflict with FERC orders or make dual compliance impossible, this Commission has the authority to review the prudence of ELI's actions *after* August 5, 1997 what no federal regulation existed that made MSS-1 overpayments mandatory. Such a prudence review would also not violate the supremacy clause. "[T]he regulation of utilities is one of the most important of the functions traditionally associated with the police power of the states." *Arkansas Electric Cooperative Corp. v. Arkansas PSC*, 461 U.S. 375, 377, 103 S. Ct. 1905, 1908, 76 L. Ed.2d. 1 (1983).

In Order No. 415, FERC only declined to order refund of amounts paid in violation of the tariff, and did not reach the issue of ELI'S prudence in *continuing to treat* ERS units as available. Thus, the extent of the FERC order stops at refusing to order refunds and approving the amendment to Section 10.02; FERC simply did not rule on the issue of whether ELI's decision to continue to include ERS units in MSS-1 calculations is a prudent one, and whether ELI must continue to make overpayments to its sister companies that the FERC found to be in violation of the System Agreement though no refunds were ordered. FERC's order did not make any future inclusion of ERS units in MSS-1 calculation mandatory. Thus, ELI had the option of continuing to treat ERS units as available upon meeting the criteria set forth in the amended Section 10.02, or treating them as unavailable. ELI was put on notice by the FERC decision that the inclusion of ERS Units in MSS-1 calculations would result in increased operating costs for ELI. Thus, (as is *NOPSI*), ELI's management decision to *continue to include ERS units in MSS-1 calculations after August 5, 1997, with the awareness that such treatment costs more to ELI, and benefits some other operating companies*, having never been addressed or decided by the FERC, was obviously not mandated by the

FERC order. This Commission as the retail ratemaking authority, has jurisdiction to decide that issue.

ELI argues that the FERC's order No. 415-A (denying rehearing) addresses the reasonableness of payments made *up to February 3, 1998*. [ELI, Post-Trial Brief at 26, 31]. However, a review of Order No. 415-A shows that the February. 1998 Order simply denied rehearing. Needless to say, no new hearings were held, no new findings of facts made in the February 1998 Order No. 415-A, and no new determinations of reasonableness were made by FERC, of MSS-1 treatment of ERS units for the period starting from August 5, 1997 to February 3, 1998. ELI has not directed this Commission to any evidence in support of its assertion that the MSS-1 payments made up to February 3, 1998 are shielded from a review by this Commission. This Commission finds no evidence to show that ELI's obligation to make MSS-1 payments under Order No. 415 was extended by Order No. 415-A to February 3, 1998. In fact, Order No. 415-A reaffirmed FERC's prior approval of the amendment to Section 10.02. Thus, ELI's obligations to make MSS-1 payments for the period ending August 5, 1997 were governed by Order No. 415, and its obligations subsequent to that period, as confirmed by Order No. 415-A, were governed by the amended Section 10.02 of the System Agreement. ELI's obligations to make FERC-approved overpayments ceased on August 5, 1997. As FERC made no attempt to assert jurisdiction over the question of ELI's prudence in continuing to accord ERS units MSS-1 treatment subsequent to the amendment of Section 10.02 of the System Agreement, ELI's arguments of *res judicata* and pre-emption have no application.

Thus, FERC's decision refusing to order a refund, only bound ELI to make MSS-1 payments to its sister companies, including the additional amounts resulting from treating ERS units as "available" up to the date of the FERC order, i.e.

August 5, 1997. *ELI was not under a FERC mandate to continue to accord ERS units MSS-1 treatment or to continue to make payments resulting from such treatment. To the contrary, ELI has been put on notice that their past treatment was in violation of the FERC tariff, and according to FERC, the approved amendment required different conduct before according such treatment.*

The principles enunciated in *Pike* and its progeny, *NOPSI v. Council for the City of New Orleans, supra*, in particular, support such a review by this Commission; this Commission a not interfering with the FERC order which denied refunds, for no refunds are ordered by this Commission; this Commission is similarly not challenging FERC's finding that Entergy's violation did not result in unjust, unreasonable, or unduly discriminatory outcome, for no inquiry into the reasonableness of the payments made up to the date of the FERC order (August 5, 1997) is made by this Commission. Finally, this Commission is not assessing Entergy's compliance with the amended Section 10.02 of the System Agreement, for a determination of violation or compliance with a FERC tariff is peculiarly within FERC's purview. (However, that question of whether the continued inclusion of ERS units in MSS-1 calculations complies with the amended Section 10.02 has never been addressed or decided by the FERC, and therefore no FERC order exists, with which this Commission's finding of imprudence could conflict.)

This Commission merely examines the prudence of ELI's management decision to continue, *after* August 5, 1997, to include ERS units in MSS-1 calculations, once the increased costs of such treatment to ELI and its ratepayers is evident to ELI, and such a treatment is not mandated by the FERC order. Such a prudence review, as explained above, is not preempted by the filed rate doctrine, and does not violate the supremacy clause, and is not *res judicata*.

e. Did ELI act prudently in continuing to accord ERS units MSS-1 treatment?

Pursuant to its authority as a retail ratemaking body, as explained above, this Commission now addresses the prudence of ELI's decision to continue to accord MSS-1 status to ERS units after August 5, 1997, and finds that decision was neither prudent nor reasonable, based on the following facts:

FERC's own finding that Entergy's treatment of ERS units violated the System Agreement, and resulted in increasing operation expenses to ELI and EMI shows that ELI was made aware by the FERC order of the increased costs to ELI and its ratepayers, if it was not aware of that prior to that date. Similarly, the evidence in this proceeding shows that ELI was not prudent in minimizing its MSS-1 payment expenses once it was no longer mandated by a FERC order to make those overpayments to its sister companies.

The FERC found that "there was no unjust enrichment as a result of the violation, *given that Entergy as a whole received no net gain* from the inclusion of ERS units in Schedule MSS-1 . . . Entergy's actions resulted *in system-wide benefits, in the form of enhanced system efficiencies and cost reductions* that ultimately benefited ratepayers . . ." (FERC Order No. 415 at 14-15, Emphasis provided]. These findings, as reflected in the italicized portions of the FERC order, apply *at the level of the parent company*, whereas this Commission is concerned solely with ELI in this proceeding. FERC's jurisdiction under 16 U.S.C.A §824 over interstate wholesale makes system-wide concerns relevant to FERC, whereas in regulating retail rates, system-wide benefits are not of prime importance to a state Commission.

In fact, where those system-wide benefits increase ELI's operation expenses, it is a reflection of the utility's failure to exercise its discretion to limit expenses, and of its

acquiescence in the parent company's decision without regard to the impact of such increased expenses on ELI's ratepayers. The impact of MSS-1 expenses on retail rates guides this Commission's review of ELI's actions insofar as the utility is not obligated to incur those expenses under the FERC order. ELI's actions affect its ratepayers in Louisiana, and this Commission's authority to regulate retail rates without interfering with FERC-set wholesale rates includes the authority to examine the prudence of ELI's management decision that affects the retail rates in Louisiana.

In addition, ELI's obligation to incur prudent costs and avoid imprudent costs includes the obligation to follow the criteria set forth in the amended Section 10.02 in reaching a decision regarding the availability status of ERS units after August 5, 1997. The Operating Committee, which made the decision, did not exert due diligence in ascertaining the costs and benefits of bringing ERS units back to service. The information presented to the Operating Committee was not based on any study of such relative costs and benefits; the Raytheon study, which the parties agree was more detailed and contained more accurate estimates, was not available to the Operating Committee at the time it made the decision under review; the estimates in the Raytheon study were sometimes more than twice the amounts reflected in Mr. Turner's presentation to the Operating Committee. The evidence does not show that the Operating Committee made efforts necessary to ascertain that ERS units would be needed within the next 10 years. The Operating Committee did not even seek the information necessary to reach a well-considered decision. The evidence shows that the Operating Committee failed to obtain the requisite data in order to reach a decision "based on consideration of current and future resource needs, the projected length of time the unit would be in ERS status, projected cost of maintaining such unit, and the projected cost of returning the unit to service".

When its obligation to make the higher MSS-1 payments ceased on August 5, 1997, ELI should have responded with a more thorough evaluation of that change in circumstances in an attempt to minimize its cost of service. Inquiry under the prudent investment rule encompasses the public utility's continuation of a plan, as well as its decision to enter into that plan, and requires the utility to respond prudently to changes in circumstances and new challenges that arise. *Gulf States Utilites v. LPSC,* 578 So.2d. 71 (La. 1991), rehearing denied, certiorari denied 112 S.Ct 637, 502 U.S. 1004, 116 L.Ed.2.d 655.

Therefore, this Commission's authority to review ELI's decision regarding ERS units after August 5, 1997 is not preempted by FERC orders No. 415 and 415-A. As in *NOPSI, Pike*, and the numerous cases that have followed them, the utility's action that is being reviewed by this state commission (i.e. continuation of MSS-1 treatment of ERS units after August 5, 1997) was not mandated by FERC. Rather, the utility had a opportunity to make a different decision and minimize its costs. Again, as in *NOPSI* and *Pike*, it is the prudence of that decision not to minimize costs that is being reviewed by this state commission. Indeed, this case presents stronger facts than *NOPSI* and *Pike,* in that the Company was put on notice by the FERC order that it was incurring increased costs, and the Company decided to continue a decision that FERC had found to be in violation of a FERC tariff.

Based on these facts, this Commission concludes that ELI acted imprudently in not minimizing its MSS-1 payments after August 5, 1997 when its FERC-set obligations to make those payments ceased. Therefore, ELI's MSS-1 overpayments for the test year of 1996 should be removed in setting its 1997-1998 rates. (However, as will be explained below, those excess payments cannot be completely disallowed since

the company's obligations under the FERC order extend partially into the rate-effective period starting July 1, 1997.)

f. Should this Commission find ELI's treatment of ERS units imprudent, does it have the authority to deny recovery of all of a prorated portion of MSS-1 payments for purposes of setting ELI's rates for 1997?

ELI argues that post test–year events may not be reflected in the calculation of test year expenses. However, this general principle that ELI relies on is subject to well-defined exceptions established by traditional regulatory priniciples such as "known and measurable" pro forma adjustments to the test year expenses, as explained above. Such adjustment in this case cannot bar MSS-1 overpayments for the whole of the rate-effective period that started on July 1, 1997, because of the FERC order refusing to order refunds of overpayments made up to August 5, 1997, the date of that Order. If the FERC Order had been issued on June 31, 1997, this Commission could adjust the 1996 test year expenses to completely exclude MSS-1 overpayments. However, the FERC order was issued on August 5, 1997, which denied refunds of all overpayments made up to that date, making it mandatory for ELI to make those payments to its sister companies.[31] Hence, this Commission cannot adjust the test year expenses to completely exclude 1996 MSS-1 payments without interfering with FERC-set wholesale rates, without "trapping" a FERC-approved overpayment. Therefore, the adjustment to the test year expenses has to be prorated in a manner such that overpayments that ELI is obligated to make

[31] As discussed in a previous section, ELI's argument that FERC's finding of reasonableness shields MSS-1 payments made up to February 3, 1998 (the date of issuance of Order No. 415-A) is rejected because Order No. 415-A simply reaffirmed the prior order dated August 5, 1997 and made no new findings of fact concerning the period between the two orders.

under the FERC order (i.e. up to August 5, 1997) will not be disallowed by this Commission in contravention of the supremacy clause and principle of *res judicata*. Hence, this Commission orders that all MSS-1 overpayments incurred on or after August 6, 1997 be removed from the company's calculation of its cost of service and credited back to the ratepayers.

Conclusion

This Commission has the authority to assess the prudence of ELI's decision to contiune to accord MSS-1 treatment to ERS units subsequent to FERC order No. 415 dated August 5, 1997. This Commission finds that the evidence in this proceeding shows that decision by ELI's management did not consider the negative impact on ELI's retail rates, and its decision was not based on accurate or complete information. This Commission also finds that ELI failed to minimize its operating costs when it decided to continue to accord MSS-1 treatment to ERS units after August 5, 1997, as the Company was put on notice by FERC Order No. 415 that such a treatment resulted in increased costs to ELI, and was in violation of the System Agreement. This Commission also finds that ELI did not take the necessary steps to obtain the information that the amended Section 10.02 requires it to, and hence it failed in its obligation to make a well-considered decision. The Company's imprudent decision has an adverse effect on its retail rates in Louisiana. The increased MSS-1 payments resulting from the treatment of ERS units as available under Schedule MSS-1 in violation of a FERC tariff should be removed from the company's calculation of its cost of service, but such disallowance should be prorated because FERC Order No. 415 imposed an obligation on ELI to make those payments for a part of the rate effective period (i.e., up to August 5, 1997).

This prorated disallowance does not create a conflict between federal and state law that would render dual compliance impossible. ELI could accept the FERC MSS-1 payments under Order No. 415 dated August 5, 1997 and still not recover continued MSS-1 overpayments past that date—i.e. ELI's ability to pay its FERC-mandated MSS-1 costs is not affected by this Order. The FERC set the MSS-1 payment levels affecting ELI's wholesale rate up to August 5, 1997. This Commission's Order sets ELI's retail rates for the rate effective period, 1997-1998, disallowing overpayments only after August 5, 1997, the date when ELI's obligation to make the FERC-mandated payments ceased.

3. RATE CAP ISSUE

Background

Under the rate cap provision in Order No. U-20925, implementing the Formula Rate Plan, ELI is subject to a base rate cap equivalent to its base rates as of December 31, 1994. This rate cap provision was recommended by LEUG in ELI's 1994 rate review proceeding. However, the FRP Rider filed by ELI to implement the FRP changes the wording to read revenue cap. LEUG filed comments with the Commission to bring to the Commission's attention the variation between term "revenue cap" in ELI's FRP Rider and the term "rate cap" in Order No. U-20925. LEUG contended that the term "revenue cap" could possibly be interpreted to require only that ELI's total revenues, and not individual rates, be maintained at or below the December 31, 1994 levels, and arguably would allow ELI to increase some its rates above the December 31, 1994 levels so long as there are decreases in other rates that would keep the company's total revenues constant within a twelve month period. LEUG argued that the term "revenue cap", interpreted in such a manner, allows the company to defeat the Commission's purpose of a rate cap ordered by the Commission to ensure rate stability.

LEUG raised this issue in the First FRP Review, and testimony was filed by both LEUG and ELI on the issue and related issues. The Administrative Law Judge's recommendation, in that proceeding, dated January 12, 1998, stated that the issue was not ripe for a determination as no rate increase was proposed by ELI at that time. LEUG presented an oral argument on this issue at the Commission's January 21, 1998 B&E meeting. The Commission decided that it was not ready to make a determination on this issue when no rate increase proposed by ELI was before the Commission. However, the Commission expressed a desire that the rate cap issue be addressed in one of the upcoming proceedings involving ELI, such as the second FRP.[32]

On September 5, 1996, ELI filed an Application for Authorization to Implement a New Rate Plan ("Application") which was originally docketed as U-22137. Contained in the Application, through the testimony and exhibits of Dr. John H. Chamberlin[33] was the Company's request to restructure its standby rate tariff.[34]

On February 9, 1998, LEUG filed a Motion to Transfer Testimony that was previously filed into record in the first FRP proceeding in Docket No. U-20925 on the issue of rate

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[32] January 21, 1998 B&E at p.32

[33] On January 5, 1998, LEUG filed a Motion to Strike the Company's Request for Increase in Standby Rates and the testimony and exhibits of Dr. Chamberlin. In an order set forth in U-22137, the Commission transferred to U-22092 certain issues relating to stranded costs. The new rate plan proposed by the Company seeks to restructure its standby rates as a necessary step in its transition to competition. The LPSC Staff and ELI filed an opposition to LEUG's Motion. CII Carbon filed a memorandum in support of LEUG's Motion. The parties presented oral arguments on this issue on February 26, 1998 before the Administrative Law Judge.

[34] Since that time, ELI has filed a request to file the testimony of Bruce Ambrose, adopting the previously filed testimony of John Chamberlin.

versus revenue cap[35] into the second or third FRP proceeding in the same docket, or in the stranded costs proceeding in that docket. In its Memorandum in Support of the Motion to Transfer Testimony, LEUG contended that the rationale for the ALJ's and the Commission's previous decision to not resolve the rate cap issue when no rate increase was at issue no longer existed, since ELI has proposed a standby rate increase. LEUG argued that, under that reasoning, the rate cap issue is therefore ripe at this time and should be addressed in the second FRP proceeding.

In addition to a Motion to Strike the testimony of John Chamberlin, which was denied, LEUG filed a Motion to Transfer Testimony which was granted on March 17th, 1998. The prefiled and hearing testimonies that were transferred addressed the issue of rate cap versus revenue cap and, as

[35] LEUG identified all those pre-filed and hearing testimonies that addressed the issue of rate cap versus revenue cap, and requested that the identified testimony be transferred. The list provided by LEUG is as follows:

Exhibit A: Direct testimony and exhibits of Maurice Brubaker, August 1996,

Exhibit B: Rebuttal testimony of Matthew Kahal, September 1996;

Exhibit C: Rejoinder testimony of Rodney Gilbreath, October 28, 1996;

Exhibit D: Rebuttal testimony of John Chavanne, October 14, 1996;

Exhibit E: Hearing testimony of Maurice Brubaker, November 5, 1996;

Exhibit F: Hearing testimony of Matthew Kahal, November 4, 1996;

Exhibit G: Hearing testimony of Rodeny Gilbreath, November 6, 1996; and

Exhibit H: Hearing testimony of John Chavanne, November 5, 1996.

identifed by LEUG consisted of (1) Direct testimony and exhibits of Maurice Brubaker, August 1996; (2) Rebuttal testimony of Matthew Kahal, September 1996; (3) Rejoinder testimony of Rodney Gilbreath, October 28, 1996; (4) Rebuttal testimony of John Chavanne, October 14, 1996; (5) Hearing testimony of Maurice Brubaker, November 5, 1996; (6) Hearing testimony of Matthew Kahal, November 4, 1996; (5) Hearing testimony of Matthew Kahal, November 4, 1996 [sic]; (6) Hearing testimony of Rodney Gilbreath, November 6, 1996; (7) Hearing testimony of John Chavanne, November 5, 1996. The identified testimony regarding the rate cap issue was transferred to the Stranded Cost Docket by a Ruling on LEUG's Motion dated March 17th, 1998. In order to put the issue before the Commission as to whether there are existing constraints to the implementation of an increased standby rate, the previously submitted testimony regarding rate and/or revenue cap, identified by LEUG was accepted for filing in the Stranded Cost Docket.

Contentions of the Parties

LEUG urged that the FRP Rider filed by ELI should be amended to reflect, consistent with the LPSC's Order No. U-20925, to read as follows: "In no event shall any increase in rates under the FRP Rider and/or relating to Waterford 3 cause any ELI rate schedule to exceed the rates that were in effect on December 31, 1994." LEUG filed a Motion to Transfer the testimony on the rate cap issue from the First FRP Review to the Second FRP Review, the Third FRP Review or the pending Stranded Costs proceedings. The Motion was granted as to transfer of the testimony to the Stranded Costs proceedings. LEUG stated that, "Because this issue will be addressed in the stranded cost proceedings, LEUG provides only a limited analysis of the issue."

LEUG argued that, based on the language in Footnote 1 of the FRP Rider, it might be possible for ELI to raise some

rates above the December 31, 1994 levels as long as the other rates were lower and the overall effect remains revenue neutral. Additionally, the FRP Order permits the pass-through of costs and benefits associated with Waterford 3, which could be in conflict with the cap on rates at the December 1994 levels. LEUG urged that to the extent that the Waterford 3 pass-through would cause rates to increase above the December 1994 levels, such increases should be disallowed.

With respect to the question as to whether the Formula Rate Plan is a revenue cap or a rate cap, Staff did not address the issue and ELI submitted that the issue should only be taken up at such time, if any, that the distinction would have some significance. The matter should be addressed at such time as there might be a violation of a rate cap but not a violation of a revenue cap, or vice versa.

Findings of Fact

56. There was no evidence on the rate cap versus revenue cap issue presented in the current 1997 Formula Rate Plan proceeding.

57. Evidence that was adduced in the 1996 Formula Rate Plan review, and identified as pertaining to the rate cap versus revenue issue, has been removed from the 1996 FRP docket, following ruling on LEUG's Motion to Transfer Testimony, and transferred to the Stranded Costs docket for consideration therein.

Legal Analysis

An administrative agency should make basic findings supported by evidence and ultimate findings which flow rationally from basic findings, articulating rational connection between facts found and orders issued. *Hay v. South Central Bell Telephone Co.*, 475 So.2d. 1052 (La. 1985). All evidence

on the rate cap issue (consisting of testimony) was transferred to the Stranded Costs docket pursuant to a ruling on LEUG's motion issued on March 17, 1998, which ruling was not appealed by any of parties, including the movant, LEUG. Therefore, there is no evidence in this docket on the issue of whether Order No. U-20925 established a rate cap or revenue cap. In the absence of any evidence on this issue, and in view of the ruling on LEUG's motion to transfer testimony, the Commission declines to address that issue in this docket.

Conclusion

There was no evidence on the rate cap issue presented in the current 1997 Formula Rate Plan proceeding. Whatever evidence was adduced in the previous FRP review has been removed from the docket and transferred to the Stranded Costs docket for consideration therein in order to join the issue with the first possible proposed rate increase, i.e., a proposed increase in ELI's Stand-by Tariff. Having no evidence before this Commission on this matter, it is not appropriate to render a decision on the issue.

IT IS THEREFORE ORDERD

1. That the net proceeds of debt shall be used to calculate the capital structure of Entergy Louisiana, Inc.

2. That the continued overpayment by Entergy Louisiana, Inc., of MSS-1 expenses resulting from the inclusion of units in Extended Reserve Shutdown, is imprudent and is to the detriment of Louisiana ratepayers.

3. That all MSS-1 overpayments incurred on or after August 6, 1997 shall be removed from the revenue requirement of Entergy Louisiana, Inc. and credited back to the ratepayers.

4. That having no evidence currently before the Commission on the rate cap / revenue cap issue, the Commission declines to render a decision on the issue at this time.

BY ORDER OF THE COMMISSION
BATON ROUGE, LOUISIANA

December 22, 1998

/s/ Don Owen
DON OWEN, Chairman
DISTRICT V

/s/ Irma Muse Dixon
IRMA MUSE DIXON,
Vice-Chairman
DISTRICT III

/s/ C. Dale Sittig
C. DALE SITTIG, Commissioner
DISTRICT IV

/s/ James M. Field
JAMES M. FIELD, Commissioner
DISTRICT II

/s/ Jack "Jay" A. Blossman Jr.
JACK "JAY" A. BLOSSMAN JR.,
Commissioner
DISTRICT I

APPENDIX D

Entergy Services, Inc. and Gulf States Utilities Company,
Docket No. EL94-13-000

Opinion and Order Affirming Initial Decision
Opinion No. 415

(Issued August 5, 1997)

I. Procedural History

On December 15, 1993, in Opinion No. 385, the Commission authorized: (1) the disposition of Gulf States Utilities Company's (Gulf States) facilities thereby effecting a proposed merger with Entergy Corporation (collectively Entergy); and (2) accepted an amendment to the Entergy System Agreement (System Agreement) that added Gulf States as an operating company subsidiary.[1] Simultaneously, the Commission initiated the current proceeding, under section 206 of the Federal Power Act (FPA),[2] to determine

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[1] *Entergy Services, Inc.* and *Gulf States Utilities Company*, Opinion No. 385, 65 FERC ¶ 61,332 (1993) (Opinion No. 385), *reh'g granted and denied in part*, Opinion No. 385-A, 67 FERC ¶ 61,192 (1994), *appeal held in abeyance*, No. 94-1414 (D.C. Cir. November 17, 1994) (unpublished order). The Entergy Operating Companies are Entergy Arkansas, Inc., Entergy Louisiana, Inc., Entergy Mississippi, Inc., Entergy New Orleans, Inc., and Entergy Gulf States, Inc. When this case was being litigated, the Entergy Operating Companies were named Arkansas Power & Light Company (AP&L), Louisiana Power & Light Company (LP&L), Mississippi Power & Light Company (Mississippi P&L), New Orleans Public Service Inc. (NOPSI), and Gulf States. For purposes of consistency, this Opinion will refer to the company names used during litigation.

[2] 16 U.S.C. § 824e (1994).

whether Entergy had violated the System Agreement by including generating units in extended reserve shutdown (ERS) under the System Agreement's Service Schedule MSS-1 (MSS-1), Reserve Equalization. Specifically, the Commission ordered that:

> a public hearing shall be held in Docket No. EL94-13-000 to consider whether the System Agreement permits the ERS units of the Operating Companies to be included in MSS-1 calculations and, if so, whether such provision is just and reasonable and not unduly discriminatory or preferential.[3]

Because of Entergy's contentions that retroactive refunds were outside the scope of the Docket No. EL94-13-000 proceeding, on April 5, 1994, the Louisiana Public Service Commission (Louisiana Commission), the Mississippi Public Service Commission (Mississippi Commission), and the Mississippi Attorney General (collectively, State Agencies) filed a complaint against Entergy in Docket No. EL94-57-000, seeking retroactive refunds plus interest for Entergy's alleged violation of the System Agreement. The Commission dismissed this complaint, stating that the issue of whether Entergy had violated the System Agreement was already before the judge in Docket No. EL94-13-000, and clarified its discussion in Opinion No. 385, as follows:

> The Commission must first determine whether Entergy did, in fact, violate the System Agreement. If the judge ultimately concludes, based on his review of the record compiled in Docket No. EL94-13-000, that the answer to this question is yes, he should determine the dollar

[3] 65 FERC at p. 62,552.

> amount of such violation for the entire period that the violation occurred. We believe that the judge also should recommend an appropriate remedy.[4]

Following a trial-type evidentiary hearing, an Initial Decision was issued on March 3, 1995.[5] State Agencies, the City of New Orleans (New Orleans), the Arkansas Public Service Commission (Arkansas Commission), Entergy, and Commission trial staff (trial staff) filed Briefs On and Opposing Exceptions to the Initial Decision. Occidental Chemical Corporation (Occidental) filed a Brief On Exceptions to the Initial Decision.

Subsequent to issuance of the Initial Decision, State Agencies filed a motion for oral argument before the Commission. They claim that oral argument is warranted because this case presents a fundamental issue pertaining to when a violation of a formula rate should be remedied. In addition, the Louisiana Commission filed a motion to supplement the record. The Louisiana Commission claims that the record should be reopened to examine additional evidence, namely, Entergy's Electric System 1996 Load & Capability Forecast for 1996-2005, which allegedly shows that ERS units will remain indefinitely in ERS status. The Mississippi Commission filed a response in support of the Louisiana Commission's motion. New Orleans, the Arkansas Commission, and Entergy each filed answers opposing the Louisiana Commission's motion.

[4] *Louisiana Public Service Commission v. Entergy Services, Inc.*, 67 FERC ¶ 61,338 at p. 62,197, *clarified*, 68 FERC ¶ 61,355 (1994).

[5] *Entergy Services, Inc. and Gulf States Utilities Company*, 70 FERC ¶ 63,018 (1995).

II. The System Agreement and the ERS Program

The general purpose of the System Agreement is set forth in Article III of that Agreement, which states:

> The purpose of this Agreement is to provide the contractual basis for the continued planning, construction, and operation of the electric generation, transmission and other facilities of the [Entergy Operating] Companies in such a manner as to achieve economies consistent with the highest practicable reliability of service, subject to financial considerations, reasonable utilization of natural resources and minimization of the effect on the environment. This Agreement also provides a basis for equalizing among the Companies any imbalance of costs associated with the construction, ownership and operation of such facilities as are used for the mutual benefit of all the Companies.[6]

Service Schedule MSS-1, set forth in section 10 of the System Agreement, provides the mechanism for equalizing system reserves among the Entergy Operating Companies. Under Schedule MSS-1, each Operating Company is responsible for a share of the total Entergy system capability; a company's share is equal to the ratio of the company's contribution to the system's twelve-month average peak load. In this way, each Operating Company's reserve ratio is equal to the system reserve ratio. Because in reality some of the Operating Companies provide more than their calculated "share" of the system's capability ("long" companies), while others provide less than their calculated "share" ("short" companies), Schedule MSS-1 provides for "short" companies to make deficiency payments to "long" companies. These

[6] *See* Ex. ENT-2 at p. 12.

payments are based on the amount of capacity that "short" companies are deficient and the average cost of the "long" companies' oil-fired and gas-fired steam units.[7]

The specific language of the System Agreement that has been the focus of review in this proceeding is as follows:

> 10.02 Company Capability
>
> A Company's Capability shall be determined monthly and shall be the sum of available owned or leased generating units, purchases and seasonal or other energy exchange from demonstrated reliable sources as follows:
>
> (a) The total capability of available generating units owned, operated under Operating Agreements for its own benefit, or leased by such Company, which units shall be included at their demonstrated net output measured in megawatts under conditions established by the Operating Committee. A unit is considered available to the extent the capability can be demonstrated and (1) is under the control of the System Operator, or (2) is down for maintenance or nuclear refueling. A unit is considered unavailable if in the judgement of the Operating Committee it is of insufficient value in supplying system loads because of (1) obsolescence, (2) physical condition, (3) reliability, (4) operating cost, (5) start-up time required, or (6) lack of due diligence in effecting repairs or nuclear refueling in the event of a scheduled or unscheduled outage.
>
> The generating units of Gulf States that were in extended reserve shutdown on the date of the merger of Entergy and Gulf States, shall not be considered available for the

[7] *See* 65 FERC at p. 62,495 (explaining terms of the System Agreement).

purpose of determining Gulf States' Capability in the Service Schedule MSS-1 Reserve Equalization calculation until the units are brought into service.[8]

The extended reserve shutdown or ERS program was conceived in the mid-1980s, after the System Agreement was executed. The ERS program was developed and implemented during a time when the Entergy Operating Companies had excess generating capacity and were evaluating methods to reduce costs.[9] The ERS program allowed the Operating Companies to save money by placing generating units in an inactive status and thereby reducing operating staff, maintenance costs, and deferring the costs of repairing units.[10] By deferring maintenance of units and yet preserving units as system reserves, the ERS program also obviated the need to build new capacity. Entergy estimates that, through August 31, 1994, the ERS program produced net savings of more than $65 million for its system.[11]

III. Issues in Dispute

The seminal issue in dispute is whether generating units that Entergy placed in ERS status satisfy the criteria, set forth in section 10.02, quoted above, to be considered "available" for purposes of calculating the Entergy Operating Companies' capability under Schedule MSS-1. The participants filed a Joint Statement of Issues identifying the following for resolution in this proceeding: (1) Did Entergy, in fact, violate the System Agreement?; (2) Assuming a violation of the

[8] Ex. ENT-2 at pp. 32-33. The last paragraph of the quoted language was added as the result of a merger concession offered by the merger applicants and accepted by the Commission in Opinion No. 385. 65 FERC at pp. 62,545, 62,547.

[9] *See* Ex. ENT-17.

[10] *See* Ex. ENT-1 at p. 40.

[11] *See Id.* at pp. 32-33.

System Agreement, what remedy, if any, is appropriate?; (3) Assuming a violation of the System Agreement, what is the dollar amount of such violation for the entire period that the violation occurred?; (4) Should Service Schedule MSS-1 of the System Agreement be amended prospectively to address expressly the ERS issue and if so, how?; and (5) Assuming a violation of the System Agreement, and assuming that refunds are an appropriate remedy, who should be responsible (and in what proportion) for those refunds?[12]

IV. Arguments at Hearing [13]

State Agencies claimed that Entergy knowingly and willfully violated the System Agreement to the detriment of LP&L, Mississippi P&L and their ratepayers. Specifically, State Agencies argued that: (1) Schedule MSS-1 permits equalization of only specified capability and costs, and does not allow the inclusion of capability that is not "available" to meet Entergy system reserve requirements, as defined in Schedule MSS-1; (2) ERS units are not available to serve the needs of the Entergy System, and thus cannot be included as capability under Schedule MSS-1 until they are brought on-line; and (3) Entergy's inclusion of the ERS units in Schedule MSS-1 was illegal conduct that was not justified as an incentive for the Entergy Operating Companies to participate in the ERS program.

As a remedy for this alleged tariff violation, State Agencies contended that Entergy should be required to revise the incorrect billings to the Operating Companies and pay interest on the amounts to be refunded, for the period beginning

[12] The Arkansas Commission disputed the inclusion of Issue (5) in the Joint Statement of Issues to the extent that it may be interpreted to include retail ratemaking matters.

[13] Since, as discussed below, this opinion affirms the Initial Decision's finding that no refunds are appropriate in this proceeding, we do not address Issues (3) and (5) in the Joint Statement of Issues.

January 1, 1987, the date of inception of the ERS program. State Agencies claimed that refunds are required because the tariff violation was patent and inexcusable and would not have been tolerated by an independent purchaser, and Entergy's actions resulted in overpayments to AP&L and NOPSI for a period beyond the normal service lives of the ERS generating units, thus causing added costs to be incurred for reserve purchases.[14] State Agencies also argued that Schedule MSS-1 should not be amended prospectively, as proposed by various parties in an Offer of Settlement.[15]

Trial staff argued that Entergy violated the System Agreement because the contract language does not permit the inclusion of ERS units in Schedule MSS-1. Because the System Agreement is a Commission-approved filed rate, trial staff maintained that the filed rate was not charged. Despite

[14] AP&L and NOPSI placed a proportionately larger share of their capacity in ERS than did Mississippi P&L or LP&L. Entergy Brief on Exceptions at p. 19. The units placed in ERS status had previously been included in Schedule MSS-1. Ex. ENT-20 at p. 13; ENT-1 at pp. 27-28, 40. Continuing to include the ERS units in Schedule MSS-1 resulted in AP&L being more "long" than it would have been, LP&L being more "short," Mississippi P&L being less "long," and NOPSI being less "short." Ex. ENT-20 at p. 14. As a result, State Agencies seek refunds, plus interest, of $19.4 million to LP&L and $16.3 million to Mississippi P&L for the period January 1, 1987 through December 31, 1993. State Agencies seek additional refunds for the post-1993 period. State Agencies Post-Hearing Memorandum at pp. 47-48.

[15] Entergy, the Arkansas Commission, New Orleans and trial staff supported an Offer of Settlement (Ex. ENT-10), included as an appendix to the Initial Decision (70 FERC at p. 65,108), that would address the treatment of ERS units under Schedule MSS-1 in the period subsequent to the Entergy/Gulf States merger. The Schedule MSS-1 provision in the Offer of Settlement would expressly allow the inclusion of the ERS units in the Schedule MSS-1 calculations in certain circumstances and also would clarify what those circumstances would be (*i.e.*, when the Entergy Operating Committee could declare an ERS unit to be available for purposes of Schedule MSS-1).

these violations, trial staff contended that Entergy's practice of including ERS units in the Schedule MSS-1 calculation was reasonable because this approach was consistent with concessions made by the merger applicants, and accepted by the Commission, in its approval of the Entergy/Gulf States merger.[16] Trial staff argued that Entergy should be required to pay refunds not in excess of the time value of the principal of the retroactive refunds (*i.e.*, interest on the difference between Schedule MSS-1 payments with and without the ERS units included in calculations under Schedule MSS-1).[17] Trial staff maintained that this remedy would be consistent with the Commission's refund policy that applies in similar circumstances, *i.e.*, when a utility fails to seek prior approval for recovery of costs through its fuel adjustment clause.[18] Finally, trial staff supported adoption of the revised Schedule MSS-1 language contained in the Offer of Settlement.

Entergy responded that it did not violate the System Agreement by including the ERS units in Schedule MSS-1 because: (1) the Schedule MSS-1 contract language gives the Entergy Operating Committee the discretion to include the ERS units in the reserve equalization calculation; (2) failure to include the ERS units in Schedule MSS-1 would be inconsistent with equalizing the cost of excess capacity on the

[16] In the Entergy/Gulf States merger proceeding, the Commission approved a condition that excluded Gulf States' existing ERS units from Schedule MSS-1 treatment, while allowing the ERS units of the other Entergy Operating Companies to continue to receive Schedule MSS-1 treatment. 65 FERC at pp. 62,545-49. This disparate treatment resulted in Entergy's pre-merger Operating Companies (and their ratepayers) receiving a substantial monetary benefit in the form of a lower equalization responsibility under Schedule MSS-1.

[17] For the period from January 1, 1987—October 14, 1994, trial staff computed the time value as $7,187,195. Ex. S-4 at pp. 14-15; Tr. 846.

[18] *See Western Resources, Inc.*, 65 FERC ¶ 61,271 (1993), *modified*, 66 FERC ¶ 61,120 (1994) (*Western Resources*) (where the Commission first enunciated this refund policy).

Entergy System, which was a major objective of the System Agreement (as recognized and expressly found reasonable by the Commission);[19] and (3) the position advocated by the Louisiana and Mississippi Commissions in the Entergy/Gulf States merger proceeding supports Entergy's interpretation of Schedule MSS-1, and contradicts the position taken by those same commissions in this proceeding.

Entergy also argued that, if a violation of the System Agreement were found, the only appropriate remedy would be to reform the System Agreement prospectively, as proposed in the Offer of Settlement. Entergy claimed that refunds are not appropriate here, even if a tariff violation were found to have occurred, because: (1) it would be inequitable to punish Entergy for taking the initiative to reduce costs and rates by implementing the ERS program; (2) the Louisiana and Mississippi Commission witnesses concede that Entergy acted in good faith and that there is no evidence of improper intent on Entergy's part; (3) there is no evidence of unjust enrichment on the part of the Entergy system as a whole; (4) under the State Agencies' refund proposal, Entergy would under-collect its costs of reserves; (5) core principles of the FPA require that retroactive rate calculations be denied; and (6) judicial precedent supports the Commission exercising its discretion not to order refunds.[20]

Finally, raising arguments similar to those made by Entergy, both the Arkansas Commission and New Orleans contended that Entergy's inclusion of ERS units in Schedule

[19] *Citing, e.g., Middle South Energy, Inc.*, Opinion No. 234-A, 32 FERC ¶ 61,425 at p. 61,952, 61,961 (1985), *aff'd in part sub nom. Mississippi Industries v. FERC*, 808 F.2d 1525 (D.C. Cir.), *vacated in part*, 822 F.2d 1104 (D.C. Cir. 1987), *cert. denied sub nom. Arkansas Public Service Commission v. FERC*, 484 U.S. 985 (1987).

[20] *See, e.g., Towns of Concord, Norwood & Wellesley v. FERC*, 955 F.2d 67 (D.C. Cir. 1992) (*Towns of Concord, et al.*).

MSS-1 did not violate the filed rate, refunds are inappropriate in this proceeding, and Schedule MSS-1 should be amended prospectively as set forth in the Offer of Settlement.

V. The Initial Decision

A. *Did Entergy, in Fact, Violate the System Agreement?*

To determine if a violation of the System Agreement occurred, the judge examined whether the ERS units meet the definition of "available" as provided in Schedule MSS-1. Schedule MSS-1 states that "a unit is considered available to the extent the capability can be demonstrated and (1) is under control of the System Operator, or (2) is down for maintenance or nuclear refueling."[21] The judge found that an ERS unit is neither under the control of the System Operator nor is it down for routine maintenance. In addition, he concluded that, because an Entergy study[22] stated that it would take 8-12 months to bring a typical ERS unit into "available status," the units are effectively in storage and their capability cannot be demonstrated. Thus, the judge found the ERS units are not available for purposes of Schedule MSS-1. Consequently, the judge found that Entergy did, in fact, violate the System Agreement.

B. *Assuming a Violation of the System Agreement, What Remedy, if any, is Appropriate?*

The judge noted that under the FPA the Commission has discretion whether to order refunds.[23] The judge determined that the Commission should exercise its discretion in this proceeding not to order Entergy to pay refunds. The judge based his decision on the following factors: (1) Entergy's actions in creating the ERS program and permitting these units to be included in Schedule MSS-1 equalization

[21] Ex. ENT-2 at pp. 32-33.

[22] *See* Ex. ENT-16.

[23] *Citing Towns of Concord, et al.*

calculations promoted cost savings and efficiency on the Entergy System, and led to substantial savings for ratepayers; (2) the end result was just, reasonable, and not unduly discriminatory; (3) the inclusion of ERS units in the Schedule MSS-1 calculations has existed since the institution of the ERS program in 1987 (without complaint by any of the state regulatory commissions); (4) Entergy's tariff violation was made in good faith, *i.e.*, there is no evidentiary support for State Agencies' claim that Entergy knowingly violated the System Agreement; and (5) the claims of the Louisiana and Mississippi Commissions that they were unaware until this complaint proceeding that Entergy was violating the System Agreement are belied by these parties' arguments in the Entergy/Gulf States merger proceeding.[24]

C. *Should Service Schedule MSS-1 of the System Agreement be Amended Prospectively to Address Expressly the ERS Issue and if so, how?*

The judge noted that this controversy was caused by the fact that the System Agreement was written before the ERS program was instituted and, therefore, the Agreement does not adequately address the treatment of ERS units. The judge found that the proposed amendment to the System Agreement contained in the Offer of Settlement properly sets out the parameters of the Operating Committee's discretion and, notwithstanding arguments to the contrary, is neither ambiguous nor does it provide the Operating Committee with unfettered discretion.[25] Moreover, the judge noted that the Commission's regulations provide a remedy for any abuse of

[24] 70 FERC at p. 65,101; *see* 65 FERC at pp. 62,545-49 (where the Louisiana and Mississippi Commissions' arguments are discussed).

[25] As noted by trial staff: "[T]o prevent the Operating Committee from arbitrarily moving out-of-service units in and out of MSS-1 calculations and thereby manipulating the flow of MSS-1 dollars among the five operating companies, specific guidelines as to what is an MSS-1 includable ERS unit must be in the System Agreement." Ex. S-1 at p. 12.

discretion. Therefore, the judge concluded that Schedule MSS-1 should be amended prospectively, as provided in the Offer of Settlement.

VI. Briefs on and Opposing Exceptions

State Agencies contend that Entergy did not comply with its lawful, filed rate when it included ERS units in Schedule MSS-1 and requests refunds to correct this error. State Agencies argue that the existing language in Schedule MSS-1 permits only available units to be included in Schedule MSS-1, and that ERS units are unavailable; consequently, they should not be included in Schedule MSS-1. State Agencies further argue that the proposed amendment to Schedule MSS-1 should be rejected because: (1) it is unnecessary because the existing contract language is clear and unambiguous; (2) it would improperly grant Entergy broad discretion to include ERS units in Schedule MSS-1 based on subjective criteria; and (3) it would provide inconsistent treatment of an ERS unit (*i.e.*, it can either be available or unavailable depending on certain circumstances). State Agencies also state that Entergy's witnesses testified that ERS units do not satisfy Schedule MSS-1 criteria and that Entergy, by knowingly violating the System Agreement, acted in bad faith. State Agencies urge the Commission not to create a "good faith" rationale for not imposing a refund because no party will ever admit bad faith and utilities will be free to violate their formula rates.[26]

Occidental adopts the exceptions of State Agencies, and also expressly excepts to the judge's failure to remedy Entergy's violation of what Occidental views as a clear and

[26] In addition, State Agencies maintain that Entergy violated the Commission's accounting rules by not placing ERS units in Account No. 105—Plant Held for Future Use. State Agencies Brief On Exceptions at pp. 44-45, 52. We will not address the accounting argument because it is beyond the scope of this proceeding. *See* 67 FERC at p. 62,197.

unambiguous provision. Occidental claims that the judge's failure to impose a remedy is not supported by Commission precedent or policy.

In its Brief On Exceptions, Entergy excepts only to the judge's finding that Entergy violated the System Agreement by including ERS units under Schedule MSS-1. Entergy argues that the judge's interpretation of the System Agreement: (1) was overly narrow, because it focussed on only the definition of unit availability in Schedule MSS-1; and (2) failed to consider all relevant contract terms and the purpose of the System Agreement (*i.e.*, to credit the Operating Companies for capacity that is built to meet expected system needs). Entergy urges the Commission to find that no violation of the System Agreement occurred.

As relevant here, New Orleans excepts to the Initial Decision's finding that trial staff was the only party to address the treatment of ERS units under Schedule MSS-1 during the Entergy/Gulf States merger proceeding. New Orleans argues that the Louisiana and Mississippi Commissions also addressed this issue through their endorsement of the merger condition involving divergent Schedule MSS-1 treatment of Gulf States' ERS units versus those of the pre-merger Operating Companies. Thus, New Orleans contends that these parties should not be rewarded with any refunds because they were aware of, and indeed actively perpetuated, Entergy's practice of including ERS units in Schedule MSS-1 calculations.

Trial staff excepts to: (1) the finding that Entergy was unaware that it was committing a tariff violation; and (2) the ruling that refunds are not an appropriate remedy. Trial staff argues that Entergy should have known that inclusion of ERS units in Schedule MSS-1 violated the terms of the System Agreement because, as the judge found, the plain language of Schedule MSS-1 does not allow such inclusion, and because the record suggests that Entergy knew as early as May 1993

that the ERS units did not meet the requirements for inclusion.[27] Trial staff concludes that the judge should have ordered some level of refunds, not to exceed an amount based on the *Western Resources* method of calculating the time value of the principal of any retroactive refunds.[28]

State Agencies filed a Brief Opposing Exceptions in which it opposes all of Entergy's and New Orleans' exceptions to the Initial Decision, as well as trial staff's argument on exceptions that Entergy should have a limited refund liability. New Orleans, the Arkansas Commission, Entergy, and trial staff filed Briefs Opposing Exceptions.

VII. Discussion

We affirm the judge's findings that Entergy did, in fact, violate the System Agreement, that refunds are not an appropriate remedy in these circumstances, and that the System Agreement should be amended as proposed in the Offer of Settlement.

A. *Entergy Did Violate the System Agreement*

We affirm the judge's determination that the language of the System Agreement permits Entergy to include generating units in Schedule MSS-1 calculations only to the extent that such units are "available."[29] ERS units can only be

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[27] Trial staff Brief On Exceptions at pp. 2-5, *citing* Ex. S-3 at p. 313; Ex. LPSC-12 at p. 313; Ex. S-4 at p. 9; Tr. 524-25.

[28] Trial staff also argues that the Commission could consider lower refund amounts if a proposed remedy based on *Western Resources* is deemed to be too excessive. Trial staff proposes that refunds can be based on the $500 per day limit established in section 316(b) of the FPA, 16 U.S.C. § 825o(b) (1994), or that the time value of money calculation can be based on the period from January 1, 1987, through January 1, 1994, which is the period from inception of the ERS program to the effective date of the Entergy/Gulf States merger. Trial staff Brief On Exceptions at pp. 8-9.

[29] 70 FERC at p. 65,096.

considered eligible for inclusion in Schedule MSS-1 calculations if they meet the System Agreement's qualifications for availability. The System Agreement does not afford the Entergy Operating Committee broad, unfettered discretion to decide which units should be eligible for inclusion in Schedule MSS-1 computations. As noted above, the System Agreement states the following with respect to classifying generating units as "available":

> A unit is considered available to the extent the capability can be demonstrated *and* (1) is under the control of the System Operator, or (2) is down for maintenance or nuclear refueling. A unit is considered unavailable if in the judgment of the Operating Committee it is of insufficient value in supplying system loads because of (1) obsolescence, (2) physical condition, (3) reliability, (4) operating cost, (5) start-up time required, or (6) lack of due-diligence in effecting repairs or nuclear refueling in the event of a scheduled or unscheduled outage.[30]

Thus, as the judge explained, to be considered available, capability must be demonstrated and the units must also be either "under the control of the System Operator" or "down for scheduled routine maintenance." In this case, we affirm the judge's findings that the ERS units do not satisfy these criteria. Entergy acknowledges that many of the ERS units are in need of repair and that the estimated time to reactivate an ERS unit is 8-12 months.[31] Also, as Entergy admitted, the units are not under the control of the System Operator, nor are they down for routine maintenance.[32] Consequently, the ERS units are not available under Schedule MSS-1.

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[30] Ex. ENT-2 at p. 32 (emphasis added).

[31] *See* Ex. ENT-16 at p. 9.

[32] *See* Ex. LPSC-12 at p. 313; 70 FERC at p. 65,096.

B. *Refunds Are Not an Appropriate Remedy*

The ordering of refunds is within the Commission's discretion.[33] Indeed, the Commission's discretion is at its "zenith" when fashioning remedies.[34] In deciding whether to order refunds, the Commission must consider the relevant factors and its decision must be equitable under the circumstances.[35] In this case, the judge found that the Commission should exercise its discretion not to order refunds. We agree with the judge that, based on the relevant factors, the equities in this case support a decision that refunds are not warranted.

The inclusion of ERS units in Schedule MSS-1 calculations did not result in an unjust, unreasonable or unduly discriminatory outcome in the circumstances.[36] The specific equitable factors we rely on in not requiring refunds here, and which also are discussed below, are as follows: (1) there was no unjust enrichment as a result of the violation, given that Entergy as a whole received no net gain from the inclusion of ERS units in Schedule MSS-1;[37] (2) given that there would have been a disincentive to participate in the ERS program without Schedule MSS-1 treatment for the units,[38] Entergy's

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[33] *See, e.g.*, 67 FERC at p. 62,197 n.8.

[34] *Niagara Mohawk Power Corp. v. FERC*, 379 F.2d 153, 159 (D.C. Cir. 1967).

[35] *See Towns of Concord, et al.*, 955 F.2d at p. 76.

[36] *See* Tr. 856; Ex. S-1 at pp. 9-11; Ex. S-4 at p. 5.

[37] As trial staff notes: "In this proceeding, however, the payments in excess of the filed rate did not go to the benefit of the parent company and its shareholders. As I noted earlier, the overpayments were merely part of equalization payments among ratepayers which algebraically added up to zero as far as Entergy as a whole and its shareholders are concerned." Ex. S-4 at p. 9.

[38] *See* Ex. ENT-14 at pp. 15-16, 28-29, 41; Ex. ENT-43 at pp. 132- 33; Ex. S-1 at p. 11; Tr. 656, 918.

actions, both in creating the ERS program and in continuing to include these units in Schedule MSS-1 calculations, resulted in considerable system-wide benefits, in the form of enhanced system efficiencies and cost reductions,[39] that ultimately benefitted ratepayers; (3) the non-Gulf States ERS units were planned and constructed for the benefit of all of the pre-merger Operating Companies, not individual Operating Companies;[40] and (4) nearly every participant in this proceeding, including State Agencies, at one time either believed that the System Agreement permitted the inclusion of ERS units in Schedule MSS-1 calculations, or at least did not protest such treatment.[41]

State Agencies maintain that allowing Entergy to include ERS units in the Schedule MSS-1 computation results in a permanent misallocation of costs.[42] We disagree. By including ERS units in the Schedule MSS-1 computation, Entergy continued the previously-approved equalization approach that was established for excess capacity on the Entergy System.[43] Moreover, if Entergy had not undertaken to reduce costs for its system by implementing the ERS program, these units would have been eligible for inclusion in Schedule MSS-1.[44] We do not believe that the Operating Companies should lose the right to have their costs equalized

[39] *See* Ex. ENT-1 at pp. 39-40, 45-46; Ex. LPSC-8 at pp. 3, 9.

[40] *See* Tr. 102-03; Ex. ENT-1 at pp. 38-41; 70 FERC at pp. 65,101-102.

[41] *See* notes 16, 24 *supra*; Tr. 118-125, 428-30, 433-34.

[42] State Agencies Brief On Exceptions at pp. 55-56.

[43] Tr. 877; *see Middle South Energy, Inc.*, Opinion No. 234, 31 FERC ¶ 61,305 at p. 61,656 (1985); 32 FERC at p. 61,952. The units placed in ERS status had been previously included in Schedule MSS-1.

[44] *See* Tr. 113-14, 951. None of the participants claim that Entergy improperly placed units in ERS status.

when they take advantage of the ERS program, which, we note, provides very significant benefits for the Entergy system.

Additionally, none of the parties to this proceeding objected to Entergy's interpretation, even at the time Entergy's interpretation of Schedule MSS-1 was brought to light during the Entergy/Gulf States merger proceeding. Moreover, as State Agencies recognize, the allocation of excess capacity under Schedule MSS-1 does not allow Entergy as a whole to gain any extra revenue.

We disagree that we are in any way abdicating our regulatory responsibility. This is not a case where we are denying the imposition of refunds because Entergy acted in "good faith."[45] By exercising our discretion not to order refunds, we are simply acting consistent with the equities in this case.[46] Indeed, the record evidence demonstrates that, although Entergy acted in a manner inconsistent with Schedule MSS-1, the end result was just, reasonable, and not unduly discriminatory.

C. *The System Agreement Should be Amended*

Entergy, the Arkansas Commission, New Orleans, and trial staff support the Offer of Settlement, which is designed to address post-merger treatment of ERS units under Schedule MSS-1.[47] The revised language intends to prevent future

[45] It should be recognized, however, as found in *Borough of Ellwood City v. FERC*, 583 F.2d 642, 647-48 (3d Cir. 1978), *cert denied*, 440 U.S. 946 (1979), that good faith may be considered by the Commission in the exercise of its remedial authority.

[46] Insofar as we are exercising our discretion and on this basis are not ordering refunds here, we need not address whether or to what extent section 206(e) of the FPA, 16 U.S.C. § 824e(c) (1994), would bar us from ordering refunds in any event.

[47] *See* Ex. ENT-10.

disputes by allowing ERS units in Schedule MSS-1 calculations pursuant to specific factors. The amendment provides in relevant part as follows:

> A unit is considered available to the extent the capability can be demonstrated and (1) is under the control of the System Operator, or (2) is down for maintenance or nuclear refueling, *or (3) is in extended reserve shutdown (ERS) with the intent of returning the unit to service at a future date in order to meet Entergy System requirements. The Operating Committee's decision to consider an ERS unit to be available to meet future System requirements shall be evidenced in the minutes of the Operating Committee and shall be based on consideration of current and future resource needs, the projected length of time the unit would be in ERS status, the projected cost of maintaining such unit, and the projected cost of returning the unit to service.*[48]

State Agencies claim that the proposed language is ambiguous and does not limit Entergy's judgment to make decisions on ERS units.[49] We disagree. This proceeding arose because of the failure of section 10.02 of the System Agreement to expressly encompass the ERS program. The proposed amendment does so. As the judge stated:

> The proposed amendment to section 10.02 cures the defects. The amendment is neither ambiguous nor does it provide the Operating Committee with unfettered discretion. The amendment sets out the parameters of the Operating Committee's discretion. The regulations of this Commission provide a remedy for any abuse of this discretion.[50]

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[48] *Id.* at pp. 4-5 (emphasis in original).

[49] State Agencies Brief On Exceptions at pp. 60-65.

[50] 70 FERC at p. 65,106.

We thus affirm the judge on this matter.

D. *The Louisiana Commission's Motion to Supplement the Record and State Agencies' Motion For Oral Argument*

We deny the motion of the Louisiana Commission, pursuant to rule 716 of the Commission's Rules of Practice and Procedure,[51] to supplement the record. The note to Line 17 of the document proffered by the Louisiana Commission, the Entergy Electric System 1996 Load & Capability Forecast, reads: "Operational deficits will be made up through short-term purchases, return-to-service units on extended reserve shutdown, or other operational actions." This language demonstrates that, for purposes of the Load & Capability Forecast, the ERS units are not retired, which is consistent with our understanding as well as the reasoning reflected in the Initial Decision. The Load & Capability Forecast, therefore, does not demonstrate a change in circumstances affecting "the very heart of the case" that would warrant reopening of the record.[52] The Initial Decision, and this opinion, are based on a comprehensive record that supports our determinations. Similarly, given the comprehensive record evidence in support of our findings, State Agencies' motion for oral argument is denied.

The Commission orders:

(A) The Initial Decision issued in this proceeding is hereby affirmed, in accordance with the discussion in the body of this opinion.

(B) Schedule MSS-1 is hereby amended, effective as of the beginning of the first complete billing cycle following the date of issuance of this order, to clarify the treatment of ERS units as provided in the Offer of Settlement.

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[51] 18 C.F.R. § 385.716 (1996).

[52] *See CMS Midland, Inc.*, 56 FERC ¶ 61,177 at p. 61,624 (1991).

(C) State Agencies' motion for oral argument is hereby denied.

(D) The Louisiana Commission's motion to reopen the record is hereby denied.

APPENDIX E

Entergy Services, Inc. and Gulf States Utility Company,
Docket No. EL94-13-000

Initial Decision

(Issued March 3, 1995)

Jacob Leventhal, Presiding Administrative Law Judge

Joint Statement of Procedural History

On December 15, 1993, the Federal Energy Regulatory Commission (FERC or Commission) authorized: 1) the merger and reorganization of Entergy Corporation (Entergy) and Gulf States Utilities Company (Gulf States) (collectively hereafter, Entergy Services); and 2) accepted an amendment to the Entergy System Agreement (System Agreement), which added Gulf States as an operating company subsidiary.[1] *Entergy Services, Inc. and Gulf States Utilities Company*, Opinion No. 385, 65 FERC ¶ 61,332 (1993). At the same time, the Commission instituted the present proceeding, under section 206 of the Federal Power Act (FPA), to determine the appropriate treatment of Entergy Operating Company generating units in extended reserve shutdown (ERS) under Service Schedule MSS-1, Reserve Equalization, of the System Agreement. The Commission ordered that:

> a public hearing shall be held in Docket No. EL94-13-000 to consider whether the System Agreement permits the ERS units of the Operating Companies to be

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[1] The other Entergy Operating Companies are Arkansas Power & Light Company ("AP&L"), Louisiana Power & Light Company ("LP&L"), Mississippi Power & Light Company ("MP&L), and New Orleans Public Service Inc. ("NOPSI").

> included in MSS-1 calculations and, if so, whether such provision is just and reasonable and not unduly discriminatory or preferential.

Opinion No. 385, 65 FERC at p. 62,552. Notice of this proceeding appeared in the *Federal Register* on January 7, 1994, thereby establishing March 8, 1994 as the refund effective date. 59 Fed. Reg. 1015 (1994).[2]

All parties to the merger proceeding in Docket Nos. EC92-21-000 and ER92-806-000 were made parties to this Docket No. EL94-13-000.[3] In addition to the Commission Trial Staff (Staff), the following have been active participants:

> Arkansas Public Service Commission (APSC); City of New Orleans (CNO); Entergy Services, Inc. (Entergy); Louisiana Public Service Commission (LPSC); Mississippi Attorney General (MAG); Mississippi Public Service Commission (MPSC); Public Utility Commission of Texas; Sam Rayburn Municipal Power Agency; and Texas Office of Public Utility Counsel.

On February 16, 1994, Entergy Services filed an offer of settlement and, in light of that offer, concurrently moved for suspension of the previously adopted procedural schedule. In a February 25, 1994 Order, the Chief Judge denied the motion to suspend the procedural schedule. *Entergy Services, Inc. and Gulf States Utilities Company*, 66 FERC ¶ 63,009, at p. 65,053 (1994).

Subsequently, in response to an LPSC motion to compel, Entergy Services moved for an order confirming that claims for retroactive refunds were outside the scope of Docket

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[2] In Opinion No. 385, the Commission ordered that the refund date will be 60 days following publication of the Commission's notice in the *Federal Register*. 65 FERC at p. 62,553.

[3] *Blanket Order Granting Interventions*, Docket No. EL94-13-000 (January 12, 1994).

EL94-13-000, as instituted by the Commission. Trial Staff, CNO and APSC supported Entergy Services' position. In an order issued March 31, 1994, the Presiding Judge, responding to this and other motions, suspended the procedural schedule to permit the LPSC and MPSC to file a complaint for retroactive refunds and to seek to consolidate that complaint with this docket.

On April 5, 1994, the LPSC, MAG and the MPSC (collectively Complainants or L/M/MAG) filed a complaint against Entergy Services in Docket No. EL94-57-000. Complainants alleged that by counting ERS units as available capacity, Entergy Services violated the System Agreement. Complainants sought refunds plus interest.

In a June 17, 1994 Order, the Commission dismissed the complaint in EL94-57-000. *Louisiana Public Service Commission, et al. v. Entergy Services, Inc.*, 67 FERC ¶ 61,338 (1994) (June 17 Order). The Commission noted that the issue of whether Entergy has violated the System Agreement was already before the Presiding Judge in Docket No. EL94-13-000 and found no reason to address that same issue in another proceeding. *Id.* at p. 62,197. The Commission clarified its discussion in Opinion No. 385, stating that:

> The Commission must first determine whether Entergy did, in fact, violate the System Agreement. If the judge ultimately concludes, based on his review of the record compiled in Docket No. EL94-13-000, that the answer to this question is yes, he should determine the dollar amount of such violation for the entire period that the violation occurred. We believe the judge also should recommend an appropriate remedy.

Id. The Commission stated that "the decision whether to order refunds in a particular case is committed to the Commission's discretion." *Id.* The Commission also dismissed an LPSC

complaint that Entergy violated the Commission's Uniform System of Accounts by failing to transfer the cost of the ERS units to Account 105 (plant held for future use). *Id.* The Commission reasoned that the complaint was raised at a "procedurally inappropriate time." *Id.*

In a September 22, 1994 Order, responding to an LPSC request for clarification and/or rehearing, the Commission explained that its June 17 Order was not intended as a final resolution of the accounting issue. *Louisiana Public Service Commission, et al. v. Entergy Services, Inc.*, 68 FERC ¶ 61,355 (1994). The Commission also clarified that the dismissal was not intended to prejudge evidentiary issues in Docket No. EL94-13-000. *Id.*

Discovery in this proceeding was conducted over a 10-month period and included numerous data requests and eight discovery depositions. On August 19, 1994, LPSC and MPSC filed prepared direct testimony. Trial Staff previously had filed prepared direct testimony on March 15, 1994. Responsive testimony was filed on September 23, 1994 by APSC, CNO and Entergy Services. On October 14, 1994, prepared rebuttal testimony was filed by APSC, CNO, Entergy Services, LPSC and MPSC. Depositions were taken of each of the nine witnesses presenting testimony.

On October 19, 1994, a joint statement of issues and pre-trial briefs were submitted by the parties in preparation for the hearing. The hearing commenced on October 24, 1994 and concluded on November 1, 1994. There were six days of hearings with 998 pages of transcript and 103 exhibits. Initial Briefs and Reply Briefs were filed by the Louisiana Public Service Commission, Mississippi Public Service Commission and Mississippi Attorney General jointly (L/M/MAG), Arkansas Public Service Commission (APSC), City of New Orleans (CNO), Entergy Services, Inc. (Entergy) and Commission staff (Staff).

Introduction

As noted in the preceding section, the genesis of this proceeding lies in the Entergy Services/Gulf States Utilities (GSU) merger. In that proceeding, Commission staff's witness, Mr. Sammon, questioned Entergy Services' placement of Operating Companies' generation units into ERS under Service Schedule MSS-1 of the System Agreement. Commission staff was the only participant to address this question. The issue was not resolved in the Initial Decision because it was outside the scope of the proceeding. The Initial Decision noted:

> Staff considers the existing practice of treatment of the EOCs' [Entergy Operating Companies] ERS units to be a violation of the System Agreement. Entergy claims the discretionary right to do so under the terms of the System Agreement. This proceeding is not the appropriate forum to adjudicate this alleged violation of the terms of the System Agreement. It is an existing practice, not instituted as a result of the merger. If, in fact there is such a violation, the appropriate action would be the filing of a complaint.

64 FERC ¶ 63,026, at p. 65,114. The Commission affirmed this ruling in Opinion No. 385, which instituted this section 206 proceeding.

Service Schedule MSS-1, in order to equalize costs of generation among the Operating Companies, provides for placement of excess generation units in extended reserve shutdown (ERS). Thus, section 10 of the Agreement, Service Schedule MSS-1, Reserve Equalization, as pertinent here, provides:

> 10.01 *Purpose*
>
> The purpose of this Service Schedule is to provide the basis for equalizing the capability and ownership cost incidental to such capability among the Companies in

such a manner that the capability and reserves of each Company after equalization shall be equal to its Capability Responsibility.

10.02 *Company Capability*

A Company's Capability shall be determined monthly and shall be the sum of available owned or leased generating units, purchases and seasonal or other energy exchange from demonstrated reliable sources as follows:

(a) The total capability of available generating units owned, operated under Operating Agreements for its own benefit, or leased by such Company, which units shall be included at their demonstrated net output measured in megawatts under conditions established by the Operating Committee. A unit is considered available to the extent the capability can be demonstrated and (1) is under the control of the System Operator, or (2) is down for maintenance or nuclear refueling. A unit is considered unavailable if in the judgment of the Operating Committee it is of insufficient value in supplying system loads because of (1) obsolescence, (2) physical condition, (3) reliability, (4) operating cost, (5) start-up time required, or (6) lack of due diligence in effecting repairs or nuclear refueling in the event of a scheduled or unscheduled outage.

The generating units of Gulf States that were in extended reserve shutdown on the date of the merger of Entergy and Gulf States, shall not be considered available for the purpose of determining Gulf States' Capability in the Service Schedule MSS-1 Reserve Equalization calculation until the units are brought into service.

Ex. No. ENT-2 at pp. 32-33.

The participants agreed upon a Joint Statement of Issues, which were tried in this proceeding. This decision addresses those issues *seriatim* below.

Issue I: Did Entergy, in Fact, Violate the System Agreement?

The active participants are divided into three basic groups. LPSC, MPSC, MAG (collectively L/M/MAG) contend that Entergy violated the System Agreement and that refunds should be retroactive as well as prospective. Commission staff (Staff) finds that there was a violation but that the refund obligation should be limited to the time value of the amounts to be refunded. The third view, held by Entergy, Arkansas Public Service Commission (APSC) and the City of New Orleans (CNO), is that there was no violation of the System Agreement. In the event that it is found that there was such a violation, APSC and CNO maintain that retroactive refunds should not be ordered.

L/M/MAG contend that Entergy, in violation of the System Agreement, unilaterally decided to include in ERS, units which were placed in long term storage and which were not available as reserves. Citing specific examples, L/M/MAG say that many of these units were in a dilapidated condition requiring extensive repair and could not be used to serve system loads. According to L/M/MAG, the evidence shows that these ERS units could not be relied upon for reserves, could not be listed as reserves on reliability reports, could not be sold as reserves and Entergy would not purchase similar units to meet its own reserve requirements.

L/M/MAG contend that Entergy included these units in ERS for its own purposes—to stabilize cash-flow. L/M/MAG believe that Entergy wanted to be able to forecast variations in cost resulting from the System Agreement and thus be able to avoid the necessity of going to retail regulators for rate increases.

L/M/MAG argue that MSS-1 requires a unit to be available before it can count as capability. It provides that a unit is

available when its capability can be demonstrated and (1) is under the control of the System Operator, or (2) is down for maintenance or nuclear refueling. These parties claim that the System Agreement does not provide discretion to the Operating Committee to determine that the conditions are met to make a unit available; but it does provide discretion to declare units unavailable. The System Agreement provides discretion to determine that units are not available if they are of "insufficient value in supplying system loads." This insufficient value may result from obsolescence, physical condition, reliability, operating cost, start up time required, or lack of due diligence in effecting repairs or nuclear refueling in the event of an outage. L/M/MAG contend that the ERS units cannot possibly be termed "available" and therefore, Entergy violated the System Agreement.

Staff agrees that Entergy violated the System Agreement from the inception of the ERS program, January 1, 1987 through the end of the pre-merger period, December 31, 1993, by including ERS units in MSS-1 computations despite the language of the System Agreement. Staff claims, as did L/M/MAG, that ERS units were included in MSS-1 calculations when they were neither under the control of the System Operator and available for dispatch nor down for maintenance or nuclear refueling.

Staff cites *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 578 (1981), for the proposition that the filed rate doctrine forbids a regulated entity to "charge rates for its services other than those properly filed with the appropriate federal regulatory authority." Staff argues that the System Agreement is a filed rate and the only rate that is legal.[4] Staff

4 Staff cites additional cases discussing the filed rate doctrine such as *Montana-Dakota Utilities Company v. Northwestern Public Service Co.*, 341 U.S. 246, 251-52 (1951) and *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 962-67 (1986).

notes that Entergy acknowledges the proposition that the System Agreement is the filed rate. As such, it is the only legal rate.

Staff disputes an Entergy claim that the System Agreement confers broad latitude on the Operating Committee to carry out the efficient and effective management of the System Agreement. As a result, Staff finds that $19,420,499 was shifted from the ratepayers in Louisiana and Mississippi to ratepayers in Arkansas and New Orleans in violation of the filed rate doctrine.

Staff contends that Entergy's interpretation of the System Agreement is inconsistent with its wording. According to Staff, at the merger hearing, Entergy witness Gallaher testified that when the Operating Committee placed units into ERS it expected to recall them within five years. Entergy's purpose of not removing operating ERS capacity from MSS-1 was to stabilize cash-flows and expectations relating to MSS-1 transactions. *See* Ex. No. S-2 at p. 150. Staff's witness considers this to be valid.

Although Staff witness Sammon testified that the current MSS-1 treatment of ERS violates the System Agreement and the filed rate doctrine, he found Entergy's practice to be reasonable. Staff notes that the Commission approved the Entergy/GSU merger based on the expectation that the pre-existing Entergy Operating Companies would receive credit for their ERS units while GSU would not. Denying credit to these companies would reduce the cushion of merger benefits upon which the Commission relied in finding that no Operating Company would be harmed by the merger.

Staff claims that the availability provisions of Article 10 of the System Agreement were designed to provide an incentive to the Operating Companies to keep their generating units in good repair and "on line" except for maintenance and refueling. If a company failed to keep a generating unit in

good repair such that the unit was forced out of service, that Operating Company would suffer a detriment under MSS-1 by having its level reduced. Staff considers this incentive/detriment effect under MSS-1 to be inappropriate for units in ERS status. Entergy witness Gallaher cited the six criteria (enumerated by L/M/MAG above) for judging whether a unit is considered unavailable and concluded that ERS units were more available than unavailable. Staff disagrees with this analysis. Staff finds that Entergy does not have unlimited discretion to declare a unit available that does not meet the initial definition of available in section 0.02(a). Staff believes that the ERS units do not meet these criteria.

Entergy, CNO, and APSC argue that Entergy did not violate the System Agreement. They contend that the Operating Committee's inclusion of ERS units in MSS-1 calculations was consistent with the System Agreement.

Entergy claims that Schedule MSS-1 was instituted to apportion among its Operating Companies the cost responsibility for the considerable amount of excess generation capacity that was expected to exist on the Entergy System. The existence of MSS-1 has enabled Entergy to avoid the cost of constructing new generating facilities and the ERS units are now being returned to full service. Entergy notes that LPSC and MPSC participated fully in the recent Entergy/GSU merger proceedings without perceiving any rate violation on Entergy's part. Entergy comments that it acted in the good faith belief that its ratemaking approach was consistent with the System Agreement and that its actions reduced costs for all Operating Companies.

Entergy urges that the System Agreement be interpreted in a way that is consistent with its purpose. Section 4.01 of the System Agreement expressly provides for the sharing of excess capacity. This purpose is implemented by Schedule MSS-1. Entergy states that at the time that the Commission approved the System Agreement and the allocation of the

Grand Gulf plant among the companies, it recognized that such excess capacity existed and specifically approved the Agreement's intent to equalize the cost of such excess capacity. Entergy I.B. at p. 10 (citing *Middle South Energy, Inc.*, 31 FERC ¶ 61,305, at pp. 61,655-56 (1985); *Middle South Services, Inc.*, 32 FERC ¶ 61,425, at p. 61,952 (1985)).

Entergy notes that the courts have observed that "[a]mbiguity easily arises when the contract is applied to its subject matter in changed circumstances," and in such circumstances the contract "should be interpreted in light of the changed circumstances to accomplish what the parties intended." *See Pennzoil Co. v. FERC*, 645 F.2d 360, 388 (5th Cir. 1981) (citing *Richmond Power & Light v. FPC*, 481 F.2d 490, 499 (D.C. Cir.), *cert. denied*, 414 U.S. 1068 (1973)).

Entergy says that no one contests the fact that it made economic sense for the System as a whole to place the units in ERS status. If there had been no excess capacity, the units would have been repaired promptly. Since excess capacity existed, repair of the units placed in ERS would have been wasteful.

Entergy contrasts the testimony of LPSC witnesses regarding "available" here and in two other cases, where they testified that units in "extended cold shutdown" status should be counted as available to meet load requirements. Entergy urges that the System Agreement be interpreted to give effect to all of its terms. Thus to accept the interpretation advocated by L/M/MAG would defeat the parties' intent to equalize excess capability.

Entergy points out that in the recent merger proceeding, LPSC witness Baron (and others) proposed amending the MSS-1 to exclude Gulf States' ERS units from receiving equalization. Entergy notes that the witness conceded under cross-examination that his current interpretation would render his amendment unnecessary.

Entergy says that its interpretation conforms to the intent of the System Agreement. The ERS program was conceived after the System Agreement was drafted. The Operating Committee was aware that the excess capacity on the System was not caused by the ERS units or by the Operating Companies, but was caused by all the generating units on the System. Thus, it says, it would be unfair to single out the Operating Companies that put units in ERS and impose a detriment on them by denying equalization.

Entergy acknowledges that several attributes of the ERS units do not permit a ready fit under section 10.02(a) of MSS-1's description of available or unavailable. Therefore, the Operating Committee unavoidably exercised some judgment and discretion. For example, section 10.02 says that units are "available" if "down for maintenance." Entergy argues that though ERS units are not down for routine maintenance, they are down for deferred maintenance. Although these units are not under the unilateral control of the System Operator, an ERS unit, on request, may be readied to meet unexpected system needs. Furthermore, under section 10.02, a unit is considered unavailable only, if "in the judgment of the Operating Committee it is of insufficient value in supplying system loads" based upon six factors. In the opinion of the Operating Committee, none of these factors would require classifying these units as unavailable.

CNO espouses many of the arguments advanced by Entergy. It notes that the ERS units were built for the System as a whole. It believes that all the Operating Companies caused the costs of the ERS units to be incurred. Therefore, CNO argues that principles of fairness in ratemaking require that all of the Operating Companies contribute to these costs. Entergy, Staff, APSC and CNO support an amendment to the System Agreement to clarify that Entergy can properly include units in ERS in MSS-1.

CNO counters the argument made by L/M/MAG that accepting their proposal would put each Operating Company in the same position they would have been if Entergy had not violated its tariff. CNO contends that each Operating Company would not have made the same recommendation to place units in ERS if it could not count ERS units in MSS-1 calculations. Specifically, it would have been imprudent for New Orleans Public Service, Inc. (NOPSI) to do so.

Along with Entergy, CNO finds that the language of the System Agreement is not clear regarding how treat [sic] ERS units. CNO points out that the issue of whether or not Entergy could count ERS units in MSS-1 calculations under its existing tariff language was expressly raised by Staff witness Sammon early on in the merger proceeding. Despite this fact, CNO says that the LPSC was a leading advocate of the mitigating condition adopted by the Judge and the Commission, whereby the ERS units of the preexisting EOCs continued to be included in MSS-1 calculations but the ERS units of GSU were excluded until actually returned to service. CNO shows that MPSC witness testified that MPSC previously supported the continued inclusion of ERS units in MSS-1 because at the time, he believed it to be in the best interests of its ratepayers to include them. MPSC only decided to protest Entergy's inclusion of the ERS units of Arkansas Power & Light Co. (AP&L), Louisiana Power & Light Co. (LP&L), Mississippi Power & Light Co. (MP&L) and NOPSI after it realized that it might be able to obtain some monetary refunds.

CNO contends that it is particularly unfair to a short company, such as NOPSI, to deny MSS-1 treatment of its ERS units. As the smallest company on the system, NOPSI would be hard hit by exclusion of its 256 mw capacity in ERS. Because it is a short company, which makes MSS-1 payments to the long companies on the System, the MSS-1 formula does not provide for the recovery of depreciation

costs, operation and maintenance expenses, insurance and taxes incurred by NOPSI. If the inclusion of NOPSI's megawatts of ERS capacity is disallowed, CNO says, NOPSI will bear the costs of its own ERS units while also paying increased MSS-1 payments to the long companies.

CNO agrees with Entergy that the ERS units are available for planning reserve purposes and provide benefits to the System. CNO argues that the real issue in this proceeding is not whether ERS units are in fact technically available for dispatch but whether such capacity should be used in calculating MSS-1 charges among Operating Companies. CNO believes considerations of equity dictate that they should.

CNO cites other instances where units that are not available for instant dispatch are included in MSS-1 calculations under the System Agreement. CNO contends that the ERS units provide not only future benefits but current ones as well. Many of the ERS generating units have been returned to service. Other costs for maintenance as well as for new construction have been deferred.

CNO interprets the MSS-1 program as a cost-sharing mechanism under which capacity is equalized among the long and short companies by comparing the percentage share of total System capacity which each company owns or has available to it under contract, with its percentage share of System demand.

In rebuttal, L/M/MAG assert that Entergy and others, ignoring relevant language of the System Agreement, rely upon a strained contention that the agreement is unclear. They maintain that the "equity considerations" raised by Entergy and its supporters require that the ratepayers of LP&L and MP&L bear the costs of an illegal cost allocation rather than Entergy's shareholders.

L/M/MAG say that Entergy violated the plain language of the tariff and allocated the cost of ERS capacity to customers in the wrong jurisdiction.

L/M/MAG dispute the claim that the System Agreement intended to equalize excess capacity. They cite section 4.01 of the System Agreement:

> Any Capability in excess of the Capability Responsibility of a Company that may exist in the system of one or more Companies as a result of installation of facilities in accordance with the provisions of the generation addition plan shall be equalized among the Companies in accordance with the provisions of the applicable Service Schedule.

Ex. No. ENT-2 ¶4.01, at 16. L/M/MAG find that the agreement does not provide for equalizing excess capacity *per se*, but equalizes that in excess of a Company's Capacity Responsibility. L/M/MAG state that the cited provision refers to capability and a generating unit does not qualify as capable under the System Agreement unless an output in megawatts can be produced by the unit.

L/M/MAG refer to Entergy witnesses' testimony that only reserve capacity is to be equalized. L/M/MAG claim that reserves are units that can be called on to serve load. Since the ERS units cannot serve load, L/M/MAG believe they do not qualify under Schedule MSS-1. L/M/MAG cite *Middle South Energy, Inc.*, 31 FERC ¶61,305, at p. 61,635 (1985), "[T]he older units now have operating characteristics directly related to use as reserve capability, and it is only reserve capacity that is to be equalized under the System Agreement." Again, L/M/MAG point out Commission language in *Middle South Energy, Inc.*, 32 FERC ¶61,425, at p. 61,959 (1985), "[T]he intent of the System Agreement has not been to specifically equalize costs, but rather to equalize any imbalance of costs associated with facilities used for the mutual benefit of all the companies."

L/M/MAG explain that in the merger proceeding, they did not focus on whether the placement of ERS units in MSS-1 constituted a possible tariff violation. At that time, their analysis concentrated on the impact of GSU's entry into the System. They say they accepted without scrutiny the representation of Entergy that it had the discretion to count ERS units under MSS-1. In any event, L/M/MAG argue that there is no ambiguity in the definition of available in the System Agreement and no discretion for the Operating Committee to declare ERS units available.

Entergy, in its Reply Brief, again argues that an LPSC sponsored witness in another FERC case, advised the Commission that because ERS units can be returned to service when needed they must be included in an Operating Company's capability for reserve purposes. *See* Ex. No. CNO-13 at p. 17.

In reply to L/M/MAG, Entergy says that section 3.01 of the System Agreement contemplates equalization of facilities that provide "mutual benefit" for the Companies. Entergy insists that MSS-1 is not confined to certain kinds of units or only to units that are actually being dispatched. Rather, it applies to all generating capability to quantify the reserves that are equalized.

Entergy maintains that the only way to interpret the Agreement is to apply it in a way that effectuates its purpose and gives it meaning as a whole. Entergy insists that the Operating Committee determination to continue to include ERS units in MSS-1 permitted efficient operation of the System.

Ruling

The issue under consideration here is whether Entergy has violated the System Agreement in placing certain ERS units into Schedule MSS-1. Many of the arguments regarding this issue in the post hearing briefs also address what adjustments

should be ordered in the event that a violation has been committed. Such arguments will be dealt with later on in the decision.

L/M/MAG characterize Entergy's treatment of ERS units as a "blatant" violation of the terms of the System Agreement. *See* L/M/MAG I.B., at p. 1. An interpretation, which has been in existence and followed by all of the parties since its inception in 1987, can hardly be characterized as blatant. As a matter of fact, it was a Staff witness in the merger proceeding that raised this issue for the first time. Furthermore, in the merger proceeding, LPSC and MPSC supported the exclusion of GSU's ERS units from MSS-1 and the adoption of an amendment to the System Agreement to accomplish this result. Under these circumstances, I cannot find this characterization valid.

Entergy can only place ERS units into MSS-1 in conformance with the System Agreement. Section 10.02(a) provides that "a unit is considered available to the extent that the capability can be demonstrated and (1) is under control of the System Operator, or (2) is down for maintenance or nuclear refueling." Entergy does not have untrammeled discretion to declare ERS units available for placement in MSS-1.

Thus in order for Entergy to consider ERS units "available," capability first must be demonstrated. Then, Entergy must show that the units are under the control of the System Operator or that the units are down for maintenance or nuclear refueling.

As Entergy admits, many of the ERS units are in a state of ill repair and would require refurbishing before they could be made serviceable. In 1987, Entergy performed an Extended Reserve Shutdown Study which identified that, "The time to reactivate the plants or units to an available status is estimated to be 8-12 months unless otherwise specified." *See* Ex. No.

ENT-16 at p. 9. As these units are in storage, capability cannot be demonstrated. Furthermore, an ERS unit is neither under the unilateral control of the System Operator nor is down for routine maintenance or nuclear refueling.

Entergy argues that one should look at the section in its entirety. Thus one must not only look to the tests for availability but also at the six elements for unavailability set forth in section 10.02(a). Entergy believes that the ERS units do not meet the standard for available or unavailable, but concludes that they are more like available units than unavailable units.

It is true that the Agreement must be read in its entirety. Entergy's argument that the ERS units are more available than unavailable is not helpful in determining eligibility for MSS-1. The test is whether the units meet the definition of available. I find that the ERS units are not available within the definition of availability. The language in the Schedule in this regard is clear and unambiguous.

The fact that the ERS program leads to System efficiencies and reduced costs for all Entergy Operating Companies is laudable. However, the ERS units must meet the clear terms of the Schedule in order to be included in MSS-1.

It is acknowledged that Entergy's actions in this regard were made in good faith. Good faith, however, cannot excuse a violation.

There is no dispute that the System Agreement is the filed and legal rate. Tr. 505.[5] The filed rate is the only legal rate. It has been long established that a regulated utility may not charge rates for its services other than those properly filed

[5] Q. (by Mr. Fontham) Now would you agree that the System Agreement is the filed rate?
A. (by Mr. Gallaher) Yes.
Q. And it is the legal rate?
A. Yes.

with the appropriate federal regulatory authority. *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 576-79 (1981).

Entergy acknowledges that the ERS program was not contemplated at the time the System Agreement was drafted and no provision expressly addresses it. Ex. Nos. ENT-1 at p. 28; ENT-14 at p. 27. Entergy relies on its interpretation that the System Agreement conferred discretion upon the Operating Committee to include ERS units in MSS-1. The plain language of section 10.02(a) is not susceptible to such an interpretation. The ERS units are not available and therefore cannot be included in MSS-1 calculations.

I find that Entergy did, in fact, violate the System Agreement.

Issue II. Assuming a Violation of the System Agreement, What Remedy, if any, is Appropriate?

L/M/MAG argue that Entergy's tariff violation resulted in overpayments by LP&L and loss of receipts by MP&L that should never have occurred. L/M/MAG believe the appropriate remedy requires Entergy to correct the tariff violation by revising the incorrect bills and paying interest on amounts to be refunded. L/M/MAG claim that this remedy is consistent with the Federal Power Act, the filed rate doctrine, and the decisions approving the System Agreement as a formula rate. L/M/MAG I.B. at pp. 28-42.

L/M/MAG claim that under the Federal Power Act, the FERC is obliged to ensure that rates charged to customers are just, reasonable and nondiscriminatory. *See* 16 U.S.C. § 824d(a). L/M/MAG state that the rates filed with the FERC become the filed, legal rates, and utilities must comply with their terms. According to L/M/MAG, the FERC generally orders refunds when it finds that a utility violated a filed rate. Here, they maintain that the only way to ensure that the filed rate is followed is to revise the bills in accordance with the formula in the System Agreement.

L/M/MAG dispute Entergy's justification for including ERS units in capability under MSS-1 as necessary to avoid a disincentive for the Operating Companies to participate in the ERS program. They argue that Entergy's tariff violation permitted the companies with proportionately greater ERS capacity (long companies) to obtain far more equalization credits than if the units had remained in service for their projected lives.

L/M/MAG find that the only disincentive for a unit placed in ERS and then returned to active status is a delay in the receipt of a credit. If the tariff were followed, the company would forego MSS-1 credit while the unit was in ERS but would receive credit for the remaining service life of the unit after it was returned to service. Thus, Ex. No. LPSC-24, used on cross examination of Staff witness Sammon, hypothetically compares 10 mw units that are kept in service (option 1) for a period of eight years against being placed in ERS for the same period (option 2). Under option 1, an annual credit of $60,000 is received in each of the first three years; under option 2, the credit is received in each of the last three years. In each case the units receive the same credit totalling $180,000.

L/M/MAG claim that Entergy's practice of placing ERS units in MSS-1 allows the long companies to receive credits or payments in excess of what they would receive if the units were included in MSS-1 for their service lives. This is illustrated by Ex. No. LPSC-25, a hypothetical which uses the same assumptions as Ex. No. LPSC-24. The exhibit demonstrates that allowing the unit to count while in ERS as well as after it comes back in service, would permit an Operating Company, such as NOPSI, to receive an annual credit of $60,000 for each of eight years, totalling $480,000. L/M/MAG believe this exhibit shows that Entergy's tariff violation permits the owning company to receive payments

for the full service life of the unit, plus the time it is in ERS. Thus refunds are needed to cure such a tariff violation. *Id.* at pp. 21-23.

On the other hand, Entergy, APSC and CNO argue that retroactive refunds are inappropriate in this proceeding. Staff recommends that Entergy refund the time value of the refunds that would otherwise be due. All four propose that the appropriate remedy is to reform the System Agreement prospectively.

Staff believes that refunds not in excess of the time value of the principal of the retroactive refunds are an appropriate remedy. Staff bases its opinion on the Commission's policy stated in *Western Resources, Inc.*, 65 FERC ¶ 61,271 (1993).

The Commission enunciated a new policy in *Western Resources*. In applying the policy, the Commission examines whether it has allowed, rejected, or not ruled on fuel adjustment clause recovery for the cost in question. It also examines whether customers enjoyed savings or suffered losses from the utility's unilateral action. 65 FERC at p. 62,252.

In this case, Staff asserts that Entergy has met the requirements in order to be eligible to be allowed to refund only the time value of the principal, rather than both the principal and its time value. First, Staff claims that Entergy could have obtained approval to include ERS units in MSS-1 calculations. Staff argues that Entergy would have met the ongoing benefits test since witnesses on both sides of the issue agreed that the ERS program has benefitted the System. Staff also claims that the Commission would have approved including ERS units in MSS-1 calculations if given the opportunity as demonstrated by its inclusion of the ERS units in MSS-1 calculations as part of the conditions for the merger proceeding.

The amount of the principal is $19,420,499 for the period January 1, 1987 through December 31, 1993. *See* Ex. No.

ENT-20 at pp. 5-6, 13-18. This value is the difference in MSS-1 payments that result from excluding ERS units, as calculated by Entergy witness Reagan. When computed from January 1, 1987 through October 14, 1994, the date Staff witness Sammon filed his Prepared Rebuttal Testimony, the time value of this amount is $7,187,195. Staff I.B. at p. 22.

L/M/MAG believe that *Western Resources* doesn't apply here because Entergy embarked on the ERS program primarily to benefit shareholders and violated the tariff to stabilize cash-flows among the companies and avoid rate examinations. According to L/M/MAG, in *Western Resources* the company incurred a $500,000 expense to produce a $1 million fuel clause saving to ratepayers. L/M/MAG assert that stockholders could not benefit from the buy-down cost in *Western Resources* because all the savings were captured by the fuel clause. In this case, L/M/MAG claim that virtually all of the savings from the ERS program benefitted stockholders. L/M/MAG state that this action misallocated costs among customers and required LP&L and MP&L to incur higher costs than they would have incurred if the tariff were followed. Thus L/M/MAG claim that full refunds are required. L/M/MAG I.B. at pp. 34-38.

Staff challenges L/M/MAG's assertion that all of the savings from the ERS program have benefitted stockholders, whereas in *Western Resources* the utilities incurred costs which benefitted ratepayers. Staff states that there is no dispute that the ERS program produced substantial savings; the dispute is what portion went to ratepayers and what portion to shareholders. Staff claims that the mere fact that there were no explicit reductions in the filed rates does not mean that the ERS savings did not benefit ratepayers. Rather, the ERS savings may have offset increases in costs and avoided the need for the Operating Companies to seek rate increases. *See* Ex. No. S-4 at p. 13.

Entergy contests Staff's proposal of a monetary sanction totaling $7.19 million based on the Commission's decision in *Western Resources*. Entergy believes that this remedy is unreasonable and unlawful. Entergy emphasizes three points: (1) the logic underlying the remedy in the *Western Resources* doctrine does not apply to the facts in this case; (2) a $7.19 million fine is completely out of proportion to what Entergy allegedly did wrong and is 70 times higher than any refund ever required under the *Western Resources* doctrine; and (3) the Staff's $7.19 million remedy is 500 percent higher than the maximum amount of monetary sanction allowed under the Commission's civil penalty jurisdiction. Entergy states that even Staff witness, Mr. Sammon, testified in his rebuttal testimony and at the hearing that the refund he calculated under this approach is "harsh" and "excessive" "in comparison with what Entergy did wrong." *See* Ex. No. S-4 at pp. 15-16; Tr. 875. In this case, Entergy claims that the Operating Committee adopted a good faith interpretation of an ambiguous contract, a situation quite unlike *Western Resources*. Entergy I.B. at pp. 46-53.

Entergy argues that the only appropriate remedy required is to reform the System Agreement prospectively. Entergy contends that no refunds or monetary penalties are appropriate in this case.

Entergy states that the Federal Power Act does not require refunds when a filed rate is violated. *Id.* at p. 27 (citing *Towns of Concord v. FERC*, 955 F.2d 67, 75-76 (D.C. Cir. 1992)). Entergy asserts that the controlling standard is whether refunds are required as a matter of equity—whether it would shock the conscience if a refund were not required. *Id.* (citing *Towns of Concord*, 955 F.2d at pp. 75-76). Entergy believes that the Commission should assess their conduct in light of the equitable factors recognized by the Commission and the courts. These equitable factors include whether the violation was deliberate; whether failure to award refunds will result in

an unjust enrichment; whether refunds would result in the likelihood of a utility under-collecting its costs; and whether the result in the case is consistent with the goals of the Federal Power Act.

Entergy claims that it implemented a program that made everybody better off than the status quo; operated its system efficiently; accomplished these beneficial results in a manner that preserved the cost equalization recently approved by the Commission; and the Commission would have, in Staff witness' judgment, approved this again a few months later in 1986, if asked. Entergy contends that the witnesses for the LPSC and MPSC admitted there is no evidence that Entergy acted in anything other than good faith. Entergy asserts that LPSC and MPSC have provided no evidence of unjust enrichment. Entergy further argues that the ERS program is consistent with the core principles of the Federal Power Act: efficiency, reliability, coordination, just and reasonable and nondiscriminatory rates, and recovery of legitimate costs. Entergy believes the L/M/MAG request for retroactive rate recalculations violates the core principles of the FPA.

Furthermore, Entergy states that the L/M/MAG claims are predicated on the notion that the right remedy is a retroactive recalculation of the Operating Companies' MSS-1 rates over the last seven years. According to Entergy, the law establishes that such retroactive rate calculations are particularly inappropriate and inequitable in either of two types of cases: (1) where the utility's conduct in question created net benefits for ratepayers, and (2) where the issue involves allocation of costs within a holding company system. *Id.* at pp. 28-29 (citing *Minnesota Power & Light Co. v. FERC*, 852 F.2d 1070 (8th Cir. 1988); *Central Illinois Public Service Co., v. FERC*, 941 F.2d 622 (7th Cir. 1991); *Gulf Power Co. v. FERC*, 983 F.2d 1095 (D.C. Cir. 1993)). Entergy insists the ERS program saved costs for wholesale customers and lowered MSS-1 rates. This case also involves a cost allocation formula, Service Schedule MSS-1. Thus Entergy believes retroactive rate recalculations are inappropriate in this proceeding.

Entergy challenges L/M/MAG's argument that Entergy "knowingly violated the tariff in a way that never would have been countenanced by an independent party." Entergy R.B. at p. 32. According to Entergy, the evidence shows that when the Operating Committee decided to continue to include ERS units in the MSS-1 calculations, it was acting in the good faith belief that it was applying the tariff as filed.

L/M/MAG challenge Entergy's argument that the refund standard to be applied is "whether it would shock the conscience if a refund were not required." L/M/MAG assert that the case cited by Entergy, *Towns of Concord v. FERC*, does not contain the term "shock the conscience" or "shocking the conscience." L/M/MAG claim that the case simply holds that the Federal Power Act does not require the FERC to grant refunds for violations of filed rates under all circumstances. According to the decision, "Customer refunds are a form of equitable relief, akin to restitution, and the general rule is that agencies should order restitution only when 'money was obtained in such circumstances that the possessor will give offense to equity and good conscience if permitted to retain it.'" 955 F.2d at pp. 75-76.

L/M/MAG insist that the equitable standard set out in *Towns of Concord* is more than satisfied. They claim that there is no equitable basis to require ratepayers in Louisiana and Mississippi to bear costs that never should have been assigned to them in the first place. L/M/MAG state that Entergy violated clear language requiring that units be "available" before they could be counted as MSS-1 capacity. Furthermore, L/M/MAG claim that Entergy's position is inequitable because its action causes ratepayers to pay twice for the same capacity. Entergy's interpretation requires

ratepayers to support the units under MSS-1 while they are in storage as well as when they are available.

In its Reply Brief, Entergy argues, as does CNO, that L/M/MAG's charts (Ex. Nos. LPSC-24 and LPSC-25) are based on incorrect assumptions. With respect to LPSC-25, Entergy explains that L/M/MAG rely on the assumption that a generating unit can be operated for precisely the number of years of its depreciation life: no more, no less. Entergy claims, however, that generating units often are operated beyond the time period adopted for depreciation purposes. Their second assumption is that after a unit is fully depreciated it has a cost identical to what it was before it was fully depreciated. Entergy claims that the exhibits should have reflected that MSS-1 charges would go down because costs are reduced due to depreciation.

CNO believes that the appropriate and equitable remedy is to amend the System Agreement prospectively to clarify that the ERS units of AP&L, LP&L, MP&L and NOPSI will be included in MSS-1 calculations. CNO argues that the L/M/MAG request for retroactive refunds should be denied. CNO claims that the practical effect of these refunds would be to impose unjust and unreasonable rates on AP&L and NOPSI. *See* Ex. No. S-4 at p. 5.

CNO asserts that L/M/MAG's request for this large amount of refunds is based on the assumption that history would have repeated itself in the exact same manner if Entergy had instead decided, back in late 1985 and early 1986, that the language of its tariff precluded it from continuing to count ERS units. CNO states that LPSC and MPSC have not proven that each of the individual Operating Companies and their ratepayers will be placed in the same position they would have been simply by recalculating the System bills. CNO claims that if Entergy had instead decided not to count the ERS units in MSS-1, the decision-making of the individual

companies, as well as savings and costs to these companies and their ratepayers, may have been quite different.

CNO argues that it is unrealistic and counter-intuitive to believe that NOPSI's decision-making would have remained the same if its ERS units had not been counted in MSS-1 calculations. Any savings which were expected to be achieved by NOPSI from the placement of its units in ERS would be wiped out entirely by the removal of those units from MSS-1 calculations. *See* Ex. No. CNO-1 at pp. 23-27.

CNO also challenges L/M/MAG's hypotheticals, which attempt to demonstrate that the only consequence to an EOC from excluding an ERS unit that it owns from MSS-1 calculations while it is in ERS status is a delay in the receipt of credit under MSS-1 for that particular unit until the time when it is returned to service. L/M/MAG argue that Ex. Nos. LPSC-24 and LPSC-25 show that an owning company receives $300,000 more of MSS-1 credit by including its hypothetical 10 mw ERS unit in MSS-1 calculations than if its 10 mw ERS unit were excluded from MSS-1 treatment. CNO claims that these exhibits and conclusions are erroneous because they make incorrect assumptions.

CNO states that LPSC's first flaw is that it wrongly assumes that the unit has only three years of remaining service life if that unit is kept in service. CNO claims that L/M/MAG overlook the fact that the remaining life of a generating unit for cost depreciation purposes is not necessarily the same as that unit's remaining service life, which is defined as the remaining interval before the unit is worn-out and incapable of further use or operation in the future. CNO argues that L/M/MAG's second flaw is that they ignore certain costs associated with the hypothetical unit that its owner will continue to incur for so long as that unit is capable of use. CNO believes that such costs include property taxes, insurance, and ownership costs. Third, CNO argues that the unit owner is better-off under "Option 1-Keep in

Service" on Ex. No. LPSC-24 than under "Option 2 Place in ERS" because of the time value of money.

CNO claims that Staff's proposed remedy is excessively harsh under the facts of this case. CNO believes Staff's remedy lacks an appropriate design to ensure that its purpose of sanctioning Entergy management is accomplished. If any refunds are ordered, CNO proposes that the remedy be structured to protect AP&L and NOPSI ratepayers from having to absorb these refund amounts. CNO believes this can be accomplished by requiring a credit to the MSS-1 bills of LP&L and MP&L without the imposition of a corresponding debit to the MSS-1 bills of AP&L and NOPSI.

In its Reply Brief, CNO lists what it believes are the core principles to this proceeding, which support the finding that all of the Operating Companies, including LP&L and MP&L, bear the costs of the ERS units. First, CNO states that the purpose of MSS-1 is to share capacity costs among all of the Operating Companies on the Entergy System. Second, CNO claims that the ERS units were planned and constructed for the benefit of all of the Operating Companies. Third, the generating units which were placed in ERS status were among the generating units originally found by the FERC to have been planned and constructed for the benefit of the System as a whole and approved for cost-sharing by all of the Operating Companies under MSS-1. Fourth, all of the Operating Companies caused the costs of the ERS units to be incurred. Fifth, there are ongoing costs associated with the ERS units to the owners of those units. Sixth, the ERS units have provided, and continue to provide benefits to the entire Entergy System. Seventh, the ERS units already have been returned to service to meet the demands of the System as a whole, or are currently planned to be returned to service to meet the demands of the System as a whole. Finally, the Complainants themselves previously supported the inclusion

of the ERS units of AP&L, LP&L, MP&L and NOPSI in MSS-1 calculations.

APSC argues that no refunds are required by the equities of the case, nor would refunds further the purposes of the FPA. APSC contends that no party has proven that ratepayers suffered any harm, much less the millions of dollars now claimed by LPSC and MPSC. APSC states that a refund would unjustly shift the cost of generating capacity constructed for the benefit of the system as a whole. Furthermore, APSC believes that refunds would not place LP&L and MP&L in the same position they would have been in if ERS units had been excluded initially. Rather, APSC claims that refunds would more likely place LP&L and MP&L in a better position than they would have been in because they will have enjoyed all the benefits of an ERS program that would probably not have taken the same form. APSC I.B. at pp. 3-9.

APSC emphasizes that LPSC and MPSC have changed their positions since the merger hearing because they realized there may be a chance to recover refunds. According to APSC, during the merger case, witnesses for LPSC and MPSC stated that it was in the best interest of the existing EOCs and their ratepayers for the ERS units of the existing Operating Companies to continue to be counted in MSS-1 but for Gulf States' units to be excluded. *See* Tr. 118-19; Tr. 397. Both LPSC and MPSC now urge the Commission to exclude from MSS-1 calculations the very same ERS units they had previously recommended to be included, claiming that such a practice violates the System Agreement. As MPSC witness Dorman Davis admitted, MPSC decided to protest Entergy's practice of including the ERS units of the existing EOCs in MSS-1 only after MPSC realized that it might be able to acquire some monetary refunds as a result of the alleged violation. *See* Tr. 400-02. APSC claims that LPSC's motive is the same—if its new position is successful and its request for

retroactive refunds is granted, LP&L could receive a windfall of as much as $19.3 million.

APSC disputes L/M/MAG's claim that Entergy's actions resulted in "overpayments" by LP&L and a "loss of receipts" by MP&L, implying that LP&L and MP&L suffered financial harm as a result of the ERS program. APSC states that the parties fail to explain how this conclusion is reached. On the other hand, APSC emphasizes that the financial benefits realized by LP&L, MP&L and the other EOCs have been well established.

Ruling

In its Order Denying Complaint and Clarifying Earlier Order, with respect to retroactive refunds, the Commission directed:

> However, any decision in this case whether we will order retroactive refunds—and if so, who should be responsible (and in what proportion) for those refunds—is premature at this point. The Commission must first determine whether Entergy did, in fact, violate the System Agreement. If the judge ultimately concludes, based on his review of the record compiled in Docket No. EL94-13-000, that the answer to this question is yes, he should determine the dollar amount of such violation for the entire period that the violation occurred. We believe that the judge also should recommend an appropriate remedy. . . .

67 FERC ¶ 61,338, at p. 62,197.

In response to the Commission's direction, the ruling in Issue I above concluded that yes, Entergy did in fact violate the System Agreement. Accordingly, we must address what the appropriate remedy should be. In a section 206 proceeding, refunds usually are ordered prospectively from the date of the order instituting the proceedings. However, the

Commission, in its discretion, may order that refunds be made retroactively for the term of the violation. Should the Commission exercise that discretion in this proceeding? I believe the answer is no.

The application of MSS-1 treatment to ERS units has existed since the institution of the ERS program without complaint by any of the state regulatory bodies or any Entergy Operating Company. There is no evidentiary support for the proposition that Entergy knowingly violated the System Agreement. Neither the language of the System Agreement nor its application to ERS units were in any manner concealed from the Operating Companies or local regulatory bodies. There was no perception of a tariff violation until Staff witness Sammon first suggested so in his testimony in the Entergy/GSU merger proceeding in 1993.

At that time the concern was to protect the Operating Companies (and incidentally retail ratepayers) from any adverse effects of the proposed merger. LPSC and other parties proposed several conditions for Commission approval of the merger.

One of these conditions excluded existing Gulf States' ERS units from MSS-1 treatment. L/M/MAG claim that they did not focus on the application of MSS-1 at that time because it was not an issue in the merger proceeding. In formulating this condition, however, the parties must have been cognizant of the language and Entergy's application of the terms of Service Schedule MSS-1. While these facts do not excuse a tariff violation, they are indicative that all parties, including Entergy, were acting in good faith.

Prospective relief from a tariff violation is warranted but is retroactive retribution reasonable under these circumstances? I believe the answer is no.

Both Entergy and L/M/MAG refer to the Court of Appeals decision in *Towns of Concord, Norwood, & Wellesley v. FERC*, 955 F.2d 67 (D.C. Cir. 1992). This decision involved

the towns of Concord, Wellesley, and Norwood, Massachusetts, which demanded refunds of amounts paid to Boston Edison in violation of its FERC filed rate.[6] The Commission declined to order a refund of the amounts collected, and the Court of Appeals affirmed the Commission.

The court discussed the Federal Power Act and the filed rate doctrine in detail. It maintained that the principal issue in this case is "whether, in light of these provisions [sections 205(c) and 206(a) of the Federal Power Act] and the [filed rate] doctrine derived from them, the Commission has any discretion to withhold refunds when it discovers that a utility has imposed charges not in conformity with its rate schedules . . . ." The court found that "the Federal Power Act reveals no statutory command mandating refunds when the rate charged exceeds that filed." *Id.* at p. 72.

The court went on to say that there is no reason to suppose that the Commission's refusal to order a refund will undermine its primary jurisdiction over the reasonableness of rates, promote discriminatory rate payments, or in any other manner thwart the core purposes of the filed rate doctrine or of the statute. *Id.* at p. 75. Thus the Commission has discretion regarding whether to provide refunds so long as that decision is reasonable.

Because of the equitable aspects of refunds, the agency must show that it considered relevant factors and struck a reasonable accommodation among them. This is particularly so where retroactive refunds are sought in a section 206 proceeding. Hence, in the instant proceeding, several factors require consideration.

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[6] Specifically, the towns received most of their power requirements from Boston Edison. Boston Edison purchased some of its power from regional nuclear power companies. For thirteen years, those companies imposed certain charges relating to the storage and disposal of spent nuclear fuel on Boston Edison. Boston Edison passed these charges on to the towns, improperly, without prior approval from the FERC.

1. The Staff witness who raised the violation issue also found that despite an apparent violation, the end result was just, reasonable and non discriminatory. Despite the claims of L/M/MAG that costs were shifted from some Operating Companies to others, Staff's judgment in this regard is persuasive.

2. The Commission did not base its acceptance of the merger upon the condition eliminating Gulf States' ERS units from MSS-1 treatment. However the Commission did state that "we fully expect the Applicants to abide by their commitments made in this proceeding."

3. Entergy did not knowingly violate the edicts of the System Agreement. Entergy, together with the Operating Companies, believed they were complying with Service Schedule MSS-1.

Entergy does not deserve censure or punishment for its good faith actions. The only other purpose of ordering retroactive refunds would be to place the parties in *status quo*. This objective can not be obtained at this point in time. The L/M/MAG argument that permitting ERS units to remain in service rather than applying MSS-1 treatment would have been less expensive is not convincing. On the contrary, the evidence shows that keeping excess units in service would have required substantial expenditures. If there would have been no savings, why would L/M/MAG have consented to the MSS-1 treatment afforded to ERS units? CNO and APSC reasonably assert that their decisions to place excess generating units into ERS was predicated upon these units receiving MSS-1 treatment. Otherwise, there would be no reason to do so. Keeping excess generation in service would have been detrimental to all the Operating Companies and would have defeated the purposes of the ERS program.

The ERS program accomplished some important benefits for all of the Operating Companies. Allowing excess

generating units to be placed in ERS status promoted cost savings and efficiency. ERS status permits deferred maintenance and preserves the units as system reserves. There is evidence that ERS program resulted in operation and maintenance savings of $65 million. Ex. Nos. ENT-1 at p. 32; ENT-5. In addition, the availability of reserves avoids or delays the building of new generating capacity to meet expected load growth.

The Commission should not exercise its discretion to provide retroactive refunds.

Nor should the Commission order a refund of the time value of the principal. In *Western Resources*, the Commission explicitly revised its refund policy. Western Resources recovered "buy-down payments" through its wholesale fuel adjustment clause, without prior permission from the Commission. Prior to *Western Resources*, the Commission policy had been to require costs that a utility had improperly recovered to be refunded in full. In *Western Resources*, the utility had fully recovered all its costs prior to filing for a waiver with the Commission. The Commission concluded:

> On review of the case law . . . we have decided to change our policy. We will order Western to refund, with interest calculcated according to our regulations, 18 C.F.R. § 35.19a, the time value of the $500,000 between April 1, 1991 and January 7, 1993, the date it filed its Request for Waiver.

65 FERC at p. 62,251.

The Commission modified its previous policy. The Commission stated that had Western sought prior approval, the utility would have received permission to recover the buy-down payments through its wholesale fuel adjustment clause. *Id.* at p. 62,249. In *Western Resources*, the company clearly knew or should have known that prior approval was necessary. Thus in *Western Resources*, the Commission

propounded an appropriate penalty for good reason. In the instant proceeding, Entergy was not aware that a violation of the System Agreement was being committed and therefore did not file an application for a tariff amendment. Therefore, in the instant proceeding, such a penalty, as Staff advocates, would be harsh and is not warranted.

Issue III. Assuming a Violation of the System Agreement, What is the Dollar Amount of Such Violation for the Entire Period that the Violation Occurred?

L/M/MAG state that Entergy's violation of the System Agreement resulted in economic harm to two Operating Companies, LP&L and MP&L, and their ratepayers. L/M/MAG claim that the dollar amount of the economic harm from January 1, 1987, through 1993 is:

Company	*Refund (Payment)*	*Interest*	*Total*
AP&L.....	$(8,828,111)	$(6,895,697)	$(15,723,808)
LP&L.....	$11,252,905	$8,134,041	$19,386,946
MP&L.....	$10,845,744	$5,433,522	$16,279,266
NOPSI....	$(13,270,538)	$(6,671,866)	$(19,942,404)

See Ex. No. LPSC-5 at p. 1. L/M/MAG argue that this calculation captures the consequences of Entergy's violations through December 31, 1993, including an interest component based on the long companies' weighted cost of capital.

L/M/MAG describe how their calculations differ from Entergy's calculations in two respects. First, Entergy's calculation includes no interest. L/M/MAG argue that the recovery of interest is necessary to repair the harm caused and that the purpose of a refund should be to place the parties in the position they would have occupied absent the tariff violations. Second, Entergy's calculation uses an ERS begin date for the Lake Catherine Units 1 & 2 of January 1, 1991. LPSC witness Baron uses a beginning date of January 1, 1987 for those units. L/M/MAG state that AP&L's Lake Catherine

units were not "available" under the System Agreement as of December 31, 1986.

L/M/MAG also challenge Entergy's suggestion that if interest is allowed, the interest rate should be based upon 18 C.F.R. § 35.19, which requires interest to be calculated "at an average prime rate for calendar quarter on all excessive rates or charges," compounded quarterly. L/M/MAG state that 18 C.F.R. § 35.19 describes how to calculate refunds under suspension orders and this refund is based on the violation of a filed rate. L/M/MAG admits that while the C.F.R. method of calculating interest has been used by the FERC in the past, outside of the context of suspension orders, no rule or regulation requires its application.

Entergy claims that no refunds of any dollar amount are appropriate in this proceeding. For the record, however, Mr. Reagan retroactively recalculated the effect of excluding ERS units from past MSS-1 billings. The results of retroactively excluding the ERS units for the period ending December 31, 1993 are:

	Benefit	*Detriment*
AP&L		$6,295,577
LP&L	$10,604,007	
MP&L	$8,816,492	
NOPSI		$13,124,922
Total	$19,420,499	$19,420,499

Entergy I.B. at pp. 55-56. Entergy has not applied interest to these calculations because it believes interest is inappropriate for the same reasons such retroactive rate recalculations are inappropriate.

Entergy challenges L/M/MAG's calculation of interest using a "weighted cost of capital of the long companies—AP&L and MP&L—during each year 1987 through 1993."

Entergy believes that this approach for calculating interest is inconsistent with FERC's regulations and contrary to FERC precedent. Entergy argues that L/M/MAG fail to point to even one FERC case or other authority supporting their interest calculation proposal.

According to Entergy, L/M/MAG only argue that the interest they calculate is needed to "place the parties in the position they would have occupied" had the ERS units been excluded from MSS-1 calculation. Entergy claims that this argument lacks a factual basis. Entergy states that L/M/MAG failed to put forth any evidence that the Operating Companies in their jurisdiction incurred additional costs of debt because they lacked the amounts they claim should be refunded. This absence of any record evidence, according to Entergy, undermines any argument based on the "cost of capital." In addition, Entergy argues that it is impossible to place the parties in the position they would have been absent the implementation of the ERS program in its current form because the program would have been far different, or non-existent, if the ERS units were excluded from MSS-1 calculations.

Entergy also challenges L/M/MAG's claim that Entergy should be responsible for paying whatever additional interest amounts accrue between January 1, 1994 and the date refunds are made. Entergy believes this argument is untenable in light of Entergy's proposed Settlement. According to Entergy, the Settlement Offer clarifies that the Operating Committee has discretion to include ERS units in MSS-1. Entergy insists that because the Settlement Offer is effective January 1, 1994, the Settlement would obviate any claims of violation after the effective date.

Entergy claims that LPSC witness Baron erroneously treats Lake Catherine units 1 and 2 as entering ERS in 1986 because they were not being run. Entergy argues that many of its intermediate units rarely run at times of excess capacity

and those units are not on ERS. *See* Ex. No. CNO-1 at pp. 12-14. In order to place a unit in the ERS program, Entergy argues that two preliminary steps are necessary. First, candidate units must be selected for possible ERS status from a system-wide perspective. Second, the Operating Committee must approve each unit for inclusion in the ERS program. *See* Ex. No. ENT-14 at pp. 15-17. In absence of meeting those steps, Entergy insists that an idle unit simply remains an idle unit. Entergy states that the Lake Catherine units went into ERS in 1991. *See* Ex. No. ENT-20 at pp. 16-17.

Staff claims that the dollar amount of the violation, as calculated by Entergy, is $19,420,499. *See* Ex. Nos. ENT-20 at pp. 5-6; ENT-22. Staff argues that principal stops accruing as of December 31, 1993, however interest should continue to accrue on the principal.

CNO claims that no refunds should be imposed on rate-payers of NOPSI and AP&L. CNO opposes the LPSC's calculation of refund amounts, including the LPSC's attempt to add carrying charges based upon a weighted cost of capital. CNO states that even if carrying charges were appropriate, which they are not, FERC interest rates, which are based on the prime rate and compounded quarterly, must be used instead of the LPSC's proposed weighted cost of capital. *See* 18 C.F.R. § 35.19a.

CNO argues that it is particularly inequitable to award refunds and carrying charges sought by the LPSC from August 29, 1991, to the present. CNO claims that the LPSC knew of Entergy's practice of including ERS units in MSS-1 reserve equalization since at least August 29, 1991, yet did absolutely nothing to protest this treatment until 1994. CNO argues that those refunds and carrying charges are the product of LPSC's own inaction and unclean hands.

CNO states that even assuming it was equitable to order refunds of any of the principal or interest sought by

L/M/MAG, which it is not, the August 29, 1991 cut-off would at least mitigate the concurrent harm to AP&L and NOPSI resulting from an award of refunds in this proceeding. CNO claims that Ex. No. CNO-20 shows that amount of principal and interest, when calculated pursuant to the FERC's regulations and cut-off as of August 29, 1991, would be $8,549,804 to LP&L and $4,421,576 to MP&L. The total combined refund amount would be $12,971,380, compared with the $35.6 million sought by L/M/MAG. CNO R.B. at p. 32.

According to APSC, the total dollar effect of inclusion of ERS units in MSS-1 under Entergy wholesale rates is zero. APSC states that L/M/MAG have failed to prove that Entergy would have made the same decisions regarding which units to place in ERS if the Operating Committee had known that ERS generating units would be excluded from MSS-1 calculations. APSC argues that the record clearly shows that the same decisions would not have been made and refunds are not appropriate.

APSC claims that on an individual company basis, hypothetically, had the Operating Committee made the same decisions, and had the pre-merger ERS units been excluded from MSS-1 calculations, AP&L would have received $6,295,577 less; LP&L would have paid $10,604,007 less; MP&L would have received $8,816,492 more; and NOPSI would have paid $13,124,922 more. Ex. No. ENT-20 at p. 14. These are the same figures that Entergy uses.

APSC suggests that if refunds are ordered, the most equitable measure would be to offset the supposed harm by the uncontested, proven financial benefits that enured to all Entergy Operating Companies as a result of the ERS program. APSC believes that this approach would more accurately return the parties to the position they would have been had the Operating Committee known such an outcome would be the result of its implementation of an ERS program.

Under such an approach, APSC claims that LP&L's windfall of $10,604,007 would be offset by the approximate $15.5 million in savings realized to date, and MP&L's windfall of $8,816,492 would be reduced by the approximate $11.7 million in savings it has realized to date. Thus, as a matter of equity, APSC claims that neither LP&L nor MP&L are entitled to refunds in this instance.

Ruling

In its Order setting this matter for hearing, the Commission required the judge, if he finds that a violation occurred to "determine the dollar amount of such violation . . . and recommend an appropriate remedy." I have found that a violation did occur.

Pursuant to the Commission mandate, this section of the decision treats the monetary value of the violation. As discussed in Issue II above, this decision finds that retroactive refunds should not be ordered in this proceeding. Nevertheless, if refunds were an appropriate remedy, the proper dollar amount is discussed below.

L/M/MAG projects the money value of the violation including interest computed on the "weighted cost of capital." While L/M/MAG make an interesting argument, there is no support for this proposal either in Commission precedent or Commission regulations. There is no real controversy. The Commission regulation, set forth in 18 C.F.R. § 35.19a, provides for the appropriate rate of interest and controls this proceeding.

Entergy calculated the total amount of the violation to be $19,420,499. Staff agrees that Entergy's computation is correct. Although APSC vigorously insists that there was no violation and therefore the dollar amount should be zero, APSC agrees that if refunds are ordered, Entergy's computation is correct. CNO opposes any refund just as vigorously, yet suggests a cut-off date of August 29, 1991.

The violation, however, persisted throughout the pre-merger period ending with December 31, 1993.

L/M/MAG dispute Entergy's ERS begin date for Lake Catherine units 1 and 2. The record shows that Lake Catherine units 1 and 2 went into ERS on December 31, 1990. *See* Ex. No. ENT-23 at p. 1. The fact that these units were idle prior to that date is not conclusive evidence of a violation. L/M/MAG have not successfully refuted Entergy's claim that an idle unit must first meet the steps necessary for inclusion in the ERS program.

Thus if refunds were a suitable remedy, contrary to the finding in this decision, the appropriate dollar amount of the violation would be $19,420,499 with interest computed in accordance with 18 C.F.R. § 35.19a until refunds are made.

Issue IV. Should Service Schedule MSS-1 of the System Agreement be Amended Prospectively to Address Expressly the ERS Issue and if so, How?

Entergy, Staff, APSC and CNO have supported an Offer of Settlement designed to address post-merger treatment of ERS units under Service Schedule MSS-1.[7] The settlement language would prevent future disputes by amending the System Agreement to make it explicit that the Operating Committee is permitted to include in the MSS-1 calculations generating units that are placed into ERS status pursuant to specified factors.

Entergy believes that the settlement proposal should be adopted on two grounds. First, Entergy argues that it identifies an appropriate set of factors for reviewing the reasonableness of including ERS units. Second, Entergy claims that the proposal preserves the distribution of merger

[7] Ex. No. ENT-10 sets out a proposed Offer of Settlement that was not adopted.

benefits which the LPSC and other parties supported in the merger proceeding.

Entergy states that the proposed settlement language appropriately establishes relevant criteria for Operating Committee decision-making. Contrary to the position of L/M/MAG, Entergy believes the language is not ambiguous and does not create confusion. Entergy claims that although it vests the Operating Committee with discretion to apply the identified standards to the evolving needs of the Entergy System, it does not grant unfettered discretion. Rather, Entergy believes that the latitude given to the Operating Committee is tempered by reviewable parameters.

Entergy claims that there is no reason that a unit has to be on line and able to run on a minute-to-minute basis to count as "reserves" under Service Schedule MSS-1. Entergy states that MSS-1 equalizes reserves, and reserves include units that are kept back or stored up, and are not needed to meet daily operating conditions. Entergy argues that, as Mr. Sammon testified, the reserve equalization payments made among the Operating Companies under MSS-1 are simply part of the cost of enjoying life in the integrated Energy System. *See* Tr. 875. According to Entergy, so long as the ERS units are providing a benefit to the System, the owning companies should not lose MSS-1 credit for them.

Furthermore, all of the Operating Companies are equally responsible for the existence of excess capacity on the Entergy System. Entergy argues that it would be unduly discriminatory to include in MSS-1 some of the excess capacity owned by some Operating Companies, and penalize others by excluding the ERS units.

Staff's position is that Service Schedule MSS-1 should be amended to allow units of the original four Operating Companies in ERS to receive capacity credit in MSS-1. Staff

accepts the wording of the proposed settlement found in Ex. No. ENT-10 at pp. 4-5.

CNO believes that the System Agreement must be amended to clarify that the ERS units of AP&L, LP&L, MP&L, and NOPSI will be included in MSS-1 calculations. CNO supports the amendment to section 10.02(a) of Schedule MSS-1 as written in Ex. No. ENT-10 at pp. 4-5 and believes that it should be adopted prospectively.

APSC argues that Service Schedule MSS-1 should be amended prospectively, according to the language found in the Offer of Settlement dated February 16, 1994, to include ERS units in calculations for MSS-1. According to APSC, modifying the System Agreement to reflect the implementation of the ERS program, a program acknowledged by both the LPSC's and MPSC's witnesses as beneficial, will allow all EOCs to save money while ensuring that the Commission's well established policy of allocating the costs of generating capacity among all the EOCs continues.

APSC claims that if the pre-merger EOC's ERS units are excluded from MSS-1 calculations, a substantial portion of the projected merger-related benefits for the pre-merger EOCs will shift to Gulf States, primarily to the detriment of AP&L and NOPSI. APSC also argues that inclusion of ERS units in Service Schedule MSS-1 calculations will ensure that capacity costs incurred for the benefit of the Entergy System will continue to be equitably allocated among the EOCs.

APSC claims that placing units in ERS status reduces costs and provides economic benefit for the Entergy System. APSC states that despite the acknowledged benefits of the ERS program, LPSC and MPSC seek to shift the entire cost of the ERS program to the owning companies by excluding ERS units from MSS-1 calculations. APSC believes this attempt to retain the benefits of the ERS program and the ERS capacity, while avoiding the costs of that capacity, is nothing more than

a request for a discriminatory subsidization at the expense of AP&L and NOPSI, in violation of sections 205 and 206 of the Federal Power Act.

L/M/MAG oppose amending MSS-1 to address the ERS issue, because the existing MSS-1 language excludes ERS units by permitting only "available" units to be counted. A unit is "available" only to the extent the capability can be demonstrated and the unit is under the control of the System Operator or is down for maintenance or refueling. *See* Ex. No. ENT-2, at p. 32. L/M/MAG argue that ERS units are not "available" and should be excluded from the determination of company capability.

L/M/MAG believe that the proposed language should be rejected because it is ambiguous and provides the Operating Committee with unbridled discretion in administering the tariff. L/M/MAG claim the Entergy proposal does not explain how the factors to consider affect the determination of whether an ERS unit is available or unavailable. Furthermore, L/M/MAG believe that Entergy's proposed amendment basically allows Entergy to include anything in the MSS-1 tariff. They claim the settlement language allows the Operating Committee to do whatever it wants, so long as it considers the cited factors.

L/M/MAG also argue that the settlement proposal cannot be justified on the theory that it preserves an allocation of merger benefits. They claim that the FERC did not reallocate benefits in approving the merger. L/M/MAG argue that in any event, the requirement of payments under MSS-1 for capacity that provides no service would be an artificial "benefit" and not an allocation of true merger savings.

Staff opposes the proposal of LPSC witness Baron and MPSC witness Davis that ERS units owned by the four pre-merger Operating Companies should be excluded from MSS-1 computations prospectively. Staff believes that such an

exclusion would upset the allocation of benefits flowing to the post-merger Operating Companies which the Commission approved in Opinion No. 385, and is therefore unreasonable. *See* Ex. Nos. S-1, at pp. 9-10; S-4, at pp. 2-4. Staff agrees with Entergy witness Reagan's calculations of the allocation that such an exclusion would cause. Reagan estimates that during the period 1994-2003, Gulf States Utilities Company would benefit by $9,139,907 and MP&L would benefit by $242,879. The remaining Operating Companies would suffer detriments during the same period: AP&L $6,380,265; LP&L $236,265; and NOPSI $2,766,256. *See* Ex. Nos. ENT-20, at pp. 7, 21-22; ENT-25.

Ruling

Since the System Agreement was written before the ERS program was instituted, it does not adequately address the treatment of the ERS units. This failure is the cause of current controversy.

Staff and all parties, except L/M/MAG, proposed an amendment to section 10.02(a) of the System Agreement which was intended to eliminate the dispute over the application of MSS-1 treatment to ERS units. *See* appendix.

This decision has ruled that Entergy violated the System Agreement because it has included ERS units in MSS-1 when they were not considered "available" under the Agreement. The placement of ERS units in MSS-1 has been in existence for many years without complaint. Operating Companies have relied on including ERS units in MSS-1 when deciding whether or not to place units in ERS status. The ERS program has worked well, enhancing the efficiency of the System.

It is clear that the condition to exclude Gulf States' ERS units from MSS-1 in the merger proceeding, which was endorsed by L/M/MAG, did confer a substantial benefit to the existing Operating Companies. The contention that payments under MSS-1 for capacity is an artificial benefit is not warranted by the record. Units could and have been brought

back into service out of ERS as needed. The ability to do so, by delaying the necessity for construction of new generation facilities, is one clear benefit. Other benefits have been discussed previously in this decision.

The current wording of section 10.02 is problematic. Even though Staff witness was critical of the language, he found that including certain ERS units in MSS-1 was just and reasonable. The proposed amendment to section 10.02 cures the defects. The amendment is neither ambiguous nor does it provide the Operating Committee with unfettered discretion. The amendment sets out the parameters of the Operating Committee's discretion. The regulations of this Commission provide a remedy for any abuse of this discretion.

Service Schedule MSS-1 of the System Agreement should be amended prospectively. The language set forth in the appendix expressly addresses the ERS issue and is accepted.

Issue V. Assuming a Violation of the System Agreement, and Assuming that Refunds are an Appropriate Remedy, Who Should be Responsible (and in what Proportion) for those Refunds?

L/M/MAG argue that the bills should be recalculated and credits and charges assessed as if the tariff had been followed. They believe that Entergy should be required to pass the full amount of refunds, including interest, to LP&L and MP&L through a credit to future system bills. They also claim that Entergy should be allowed to surcharge the future system bills of AP&L and NOPSI for the benefit they received from the ERS violations, including interest. L/M/MAG assume this method parallels the one used by Entergy to correct accounting and other errors on System billings.

Entergy believes the issue in this proceeding regards wholesale costs and how those costs should be allocated among the Operating Companies to equalize the cost of reserve capacity on the Entergy system. Thus Entergy argues

that if LP&L and/or MP&L receives(s) a refund because it was allegedly overcharged, the other Operating Companies (AP&L and NOPSI) must have been undercharged. Entergy argues that the company and its shareholders are not supposed to be harmed in any way by this equalization process, which is a matter of cost allocation equity.

Entergy claims that the appropriate mechanism for providing a refund would be through revisions to the intra-system bill. Companies that allegedly overpaid would receive a credit; companies that underpaid would receive a corresponding debit. In this way the filed rate (the MSS-1 formula) does not change.

Staff's position is that Entergy should recompute the monthly bills to the Operating Companies for the period January 1, 1987 through December 31, 1994. Staff believes that refunds should be credited back to the time period in which an Operating Company experienced a deficit in billings. As an alternative, Staff believes credits could be applied against future MSS-1 billings. Staff states that the credits would be due to the Operating Company who received excessive MSS-1 billings.

According to Staff's proposal, based on computations of interest through October 14, 1994, AP&L would owe payments of $3,006,967 and NOPSI would owe payments of $4,180,228. *See* Tr. 866; Tr. 858. Staff calculates that LP&L would receive credits of $4,811,774 and MP&L would receive credits of $2,375,421. Staff I.B. at pp. 25-26.

CNO argues that shareholders must be held responsible for any refunds. CNO believes that fairness requires protecting ratepayers from having to absorb the costs of any refunds. CNO claims that the purpose of the remedy ought to be determinative of its design and in this case, the purpose is to sanction Entergy management for negligently failing to adhere to its filed rate and to deter potential tariff violations

in the future. CNO maintains that the Commission cannot allow Entergy, or any company, to shift costs to ratepayers incurred as a result of its negligent or imprudent decision-making. CNO cites both Supreme Court and FERC decisions to support its theory.

CNO states that Entergy can credit the MSS-1 bills of LP&L and MP&L for any refund amounts without a corresponding debit to the MSS-1 bills of NOPSI and AP&L. CNO argues against the assertion that the wholesale rate at issue must always be a zero sum game. CNO asserts that MSS-1 does not have to be a zero sum game when it comes to fashioning an equitable refund remedy.

CNO also suggests that in the alternative, the Commission could direct its Staff to seek civil penalties against Entergy management in accordance with sections 314, 315, 316 and 317 of the FPA. CNO R.B. at p. 39 (citing 16 U.S.C. §§ 825m, 825n, 825o, 825p). CNO claims that the purpose of FERC Staff's proposed refund remedy is to sanction Entergy management for violating its filed tariff. *See* Ex. No. S-4 at pp. 7-8. CNO believes that a sanction under the civil penalty procedures would be more equitable to Entergy management and commensurate with the type of technical violation that allegedly occurred.

APSC argues that any refunds, if ordered, should not be borne by retail ratepayers.

APSC challenges Entergy's proposal that refunds should not be borne by shareholders. APSC argues, since MSS-1 at the wholesale level is a "zero-sum game," Entergy's recommendation is premised on the assumption that refunds will be flowed through at retail by LP&L and MP&L, thus necessitating a corresponding recovery at retail by AP&L and NOPSI. APSC claims that Entergy's argument violates two basic rate-making principles: (1) the doctrine against retroactive rate-making; and (2) the principle that a utility is entitled to rates which allow it the opportunity to earn its

reasonable cost of service including a return on investment, but no more.

APSC asserts that Entergy has failed to show that shareholders even need to be "made whole," since it has failed to prove that, if refunds are ordered Entergy will not have recovered its cost of service during the refund period. APSC believes that allowing Entergy to recover from ratepayers any refunds ordered would be piecemeal rate-making. This would result in ratepayers being unfairly assessed for an under-recovery of only this one particular revenue component, without a review of all other cost or revenue changes. APSC claims that absent a showing by Entergy of an overall under-recovery of the costs of service during the 1987-1994 period, Entergy's proposal that ratepayers bear the burden of any refunds should be rejected.

Entergy argues that this is strictly a wholesale contract matter, and the Commission should only consider the effect of its decision on the wholesale level. Entergy claims that CNO provided no basis for holding shareholders responsible for refunds. Entergy asserts that neither negligence or imprudence is an issue in this case because Entergy acted to save costs and reduce rates to all Operating Companies. Furthermore, Entergy challenges the cases relied on by CNO.

Ruling

Assuming a violation of the System Agreement, and assuming that refunds are an appropriate remedy, the bills should be recalculated and credits and charges assessed to the Operating Companies as if the tariff had been followed. This remedy properly allocates overpayments and underpayments among the Operating Companies. This remedy would put the parties in the position they would have been in had the System Agreement not been violated.

CNO claims that if refunds are ordered, Entergy shareholders should be responsible for the amounts assessed. CNO

sponsors a remedy to sanction Entergy for negligently failing to adhere to its filed rate and to deter potential tariff violations in the future. CNO argues that an equitable refund remedy need not result in a "zero sum" game. CNO's proposal to credit to certain bills without a corresponding debit to other bills results in Entergy shareholders bearing the costs of the violation. The CNO proposal is not appropriate.

The cases cited by CNO deal with issues of imprudence, negligence, mismanagement, or inefficiency. None of these issues are present here. Entergy's violation was not due to imprudence, negligence, mismanagement or inefficiency. As discussed throughout this decision, Entergy acted in good faith. Actions made in good faith do not deserve sanction and are not in need of deterrence.

Entergy's proposal for handling refunds appears fair and reasonable and is reasonable. Under this proposal, each Operating Company would receive or owe credits in the proportions that they received or paid compensation under MSS-1 for the appropriate period.

Conclusion

Again, it is emphasized that this decision finds that retroactive refunds should not be ordered. The appropriate remedy is the adoption of the proposed amendment to the System Agreement set forth in the appendix.

Order

It is ORDERED, subject to review by the Commission on exceptions or on its own motion, as provided in the Commission's Rules of Practice and Procedure, that within 30 days of the issuance of the Final Order of the Commission adopting the Initial Decision in this proceeding, all parties shall take the appropriate action to implement all the rulings made in this decision.

Appendix

Offer of Settlement EL94-13-000

Settlement Provisions

Section 10.02(a) of the System Agreement shall be clarified to explicitly state that a unit that is placed in ERS with the intent of returning the unit to service at a future date in order to meet Entergy System requirements may be considered available for purposes of calculating reserve equalization payments under MSS-1. The amendment is shown below in ***bold type and underlined*** and is set out in the context of section 10.02(a). The language shown in *italics* is proposed to be added (along with another provision) to this section of the System Agreement by a Compliance Filing submitted to the Commission on December 30, 1993, in the merger proceedings, Docket Nos. EC92-21-000 and ER92-806-000. Section 10.02(a) shall read as follows:

> The total capability of available generating units owned, operated under Operating Agreements for its own benefit, or leased by such Company, which units shall be included at their demonstrated net output measured in megawatts under conditions established by the Operating Committee. A unit is considered available to the extent the capability can be demonstrated and (1) is under the control of the System Operator, or (2) is down for maintenance or nuclear refueling, *or (3) is in extended reserve shutdown (ERS) with the intent of returning the unit to service at a future date in order to meet Entergy System requirements. The Operating Committee's decision to consider an ERS unit to be available to meet future System requirements shall be evidenced in the minutes of the Operating Committee and shall be based on consideration of current and future resource needs, the projected length of time the unit would be in ERS*

status, the projected cost of maintaining such unit, and the projected cost of returning the unit to service. A unit, *including an* ERS unit, is considered unavailable if in the judgment of the Operating Committee it is of insufficient value in supplying system loads because of (1) obsolescence, (2) physical condition (3) reliability, (4) operating cost, (5) start-up time required, or (6) lack of due-diligence in effecting repairs or nuclear refueling in the event of a scheduled or unscheduled outage. *Notwithstanding the foregoing*, the generating units of Gulf States that were in extended reserve shutdown on the date of the merger of Entergy and Gulf States, shall not be considered available for the purpose of determining Gulf States' Capability in the Service Schedule MSS-1 Reserve Equalization calculation until the units are brought into service.

APPENDIX F

SUPREME COURT OF LOUISIANA

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From: CLERK OF THE SUPREME COURT OF LOUISIANA

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On the 24th day of May, 2002, the following action was taken by the Supreme Court of Louisiana in the case(s) listed below:

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Rehearing(s) Denied:

2001-CA-1725 ENTERGY LOUISIANA, INC. V. LOUISIANA PUBLIC SERVICE COMMISSION, ET AL. (Parish of E. Baton Rouge)
KIMBALL, J., would grant a rehearing.
TRAYLOR, J., would grant a rehearing.

APPENDIX G

Entergy Services, Inc. and Gulf States Utilities Company,
Docket No. EL94-13-002

Order Denying Rehearing
(Issued February 3, 1998)

Before Commissioners: James J. Hoecker, Chairman; Vicky A. Bailey, William L. Massey, and Linda Breathitt.

[Opinion No. 415-A Text]

I. Background

In Opinion No. 415,[1] the Commission affirmed an Initial Decision finding, *inter alia*, that: (1) the Entergy Operating Companies had violated the Entergy System Agreement (System Agreement) by including generating units in extended reserve shutdown (ERS)[2] under the System Agreement's Service Schedule MSS-1 (MSS-1), Reserve Equalization;[3] (2) based on a balancing of the pertinent equities, refunds were not appropriate; and (3) the System Agreement should

[1] *Entergy Services, Inc. and Gulf States Utilities Company*, Opinion No. 415, 80 FERC ¶ 61,197 (1997).

[2] As explained in Opinion No. 415, the ERS program allows the Entergy Operating Companies to place generating units in an inactive status and thereby reduce operating staff, maintenance costs, and defer the costs of repairing units. By deferring maintenance of units and yet preserving units as system reserves, the ERS program has allowed the Entergy Corporation (Entergy) system to lower its costs and also obviated the need to build new capacity. Entergy has estimated that, through August 31, 1994, the ERS program produced net savings of more than $65 million for its system. *See* Ex. ENT-1 at 32.

[3] Service Schedule MSS-1, set forth in section 10 of the System Agreement, provides the mechanism for equalizing system reserves among the Entergy Operating Companies.

be amended prospectively to clarify under what circumstances ERS units should be included in the Schedule MSS-1 calculation.

On September 4, 1997, the Louisiana Public Service Commission, the Mississippi Public Service Commission, and the State of Mississippi (collectively, State Agencies) filed a request for rehearing of Opinion No. 415. State Agencies claim that the Commission erred in Opinion No. 415 by: (1) not ordering a full refund, with interest, to remedy the violation of the System Agreement; (2) finding that Entergy and its shareholders did not benefit as a result of the ERS program; (3) finding that the benefits of the ERS program were enjoyed by customers of Louisiana Power & Light Company (LP&L) and Mississippi Power & Light Company (MP&L) and that the inability to include ERS units in Schedule MSS-1 calculations would provide a disincentive to participate in the ERS program; (4) approving the amendment to the System Agreement; and (5) failing to quantify damages to reflect the ineligible Schedule MSS-1 inclusion, plus interest.

II. Discussion

We deny State Agencies' request for rehearing. While State Agencies correctly point out that the Commission's general policy is to order refunds to remedy overcharges,[4] in this case the equities support denial of State Agencies' refund request. Even though there was a violation of the System Agreement, the Commission found that the end result of the treatment of the ERS units was just, reasonable, and not unduly discriminatory. As a result, we did not believe that the violation of the System Agreement resulted in overcharges that would, on balance, justify imposition of refunds.[5] We

[4] Rehearing at 4.

[5] State Agencies' incorrectly argue that our denial of refunds abdicates our responsibility to afford parties protection against a violation of a

found in Opinion No. 415 that the only appropriate remedy in this case is to amend the System Agreement prospectively to provide clarity in determining when ERS units should be included in Schedule MSS-1. Nothing raised in State Agencies' rehearing changes these conclusions.

State Agencies argue that the Commission erred in its balancing of the equities in Opinion No. 415. Specifically, State Agencies claim that Entergy misallocated Schedule MSS-1 costs for purposes of benefitting its shareholders and that the ERS savings did not flow through to ratepayers because Entergy pursued a policy of avoiding rate cases.[6] State Agencies also maintain that the Commission improperly concluded that Schedule MSS-1 treatment was necessary to provide proper incentives for the Entergy Operating Companies to participate in the ERS program.[7]

State Agencies have not adequately supported their claims. The record evidence cited by State Agencies (*e.g.*, Tr. 587-591) does not show that Entergy avoided rate cases so that its shareholders could retain the cost savings from the ERS program; rather, the record indicates that, by cutting costs, Entergy was able to avoid *rate increase* filings. This was certainly beneficial to ratepayers. Moreover, as pointed out by a Commission trial staff witness at hearing, given that only one of the Entergy Operating Companies, *i.e.*, Arkansas Power & Light Company (AP&L), has wholesale customers, and that most of AP&L's wholesale customers are served pursuant to cost-of-service formula rates, most of those

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formula rate. Rehearing at 7-9. This section 206 proceeding has provided State Agencies with the necessary forum to challenge the Entergy Operating Companies' implementation of the formula rate. In these circumstances, however, the record demonstrates that the ordering of refunds is not appropriate.

[6] Rehearing at 10-13.

[7] *Id.* at 13-22.

customers should have received their share of ERS savings.[8] To the extent State Agencies believed that an individual Operating Company was overcollecting costs prior to this proceeding, they were free to file a complaint under section 206 of the Federal Power Act challenging the overall level of such rates or the charges assessed under the System Agreement to that individual Operating Company,[9] but they did not do so.

The equitable factors referenced in Opinion No. 415 demonstrate that it was appropriate not to require refunds in these circumstances.[10] Moreover, as was explained in Opinion No. 415, the ERS units had been accorded Schedule MSS-1 treatment prior to being placed in ERS status, and it is

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[8] Ex. S-4 at 11-12. Retail customers benefitted from the ERS program because: (1) the program enabled the Entergy system to postpone construction and acquisition of new facilities to meet load growth; (2) the program led to a reduction in the rates for Schedule MSS-3 economy energy sales; and (3) there was an opportunity for ERS cost savings to be passed through in LP&L's retail rate case filed after the inception of the program. *See* Ex. S-4 at 11-13; Ex. ENT-1 at 34, 48-51, 59-60, 74; Ex. ENT-20 at 6, 19-21; Ex. ENT-34 at 7-11; Ex. ENT-14 at 30; Ex. LPSC-8 at 2-3, 9.

[9] The hypothetical examples set forth in the tables presented by State Agencies, attempting to depict that Schedule MSS-1 treatment of ERS units permits overcollecting of costs, are based on incorrect assumptions and fail to account for significant costs. *See* Rehearing at 16-18. The tables fail to recognize that, if an Operating Company were to place a unit in ERS status and temporarily forego Schedule MSS-1 recovery, it would continue to incur significant costs associated with that ERS unit, *e.g.*, capital costs, property taxes, and insurance (*see* Tr. 947-48 and Ex. ENT-1 at 41), that it would not be recovering. Significantly, the tables also fail to account for the time value of money, because they do not reflect the fact that revenue received during early years of the study period is more valuable on a net present value basis than the same revenue received during later years of the study period. *See* New Orleans City Council Brief Opposing Exceptions at 34-35; Entergy Reply Brief at 21-22; Entergy Brief Opposing Exceptions at 62-63.

[10] 80 FERC at pp. 61,787-88.

uncontroverted that these units would have continued to be eligible for Schedule MSS-1 treatment had Entergy not implemented the ERS program. Thus, contrary to State Agencies' contentions, to require the discontinuation of Schedule MSS-1 inclusion once a unit was placed in ERS status would have created a disincentive for the Entergy Operating Companies to place units in ERS status.[11] Continuation of Schedule MSS-1 treatment should not be denied in circumstances where an Entergy Operating Company seeks to reduce costs by participating in the ERS program.

Finally, we reject State Agencies' arguments that we erred in approving the amendment to the System Agreement and in failing to quantify damages. As noted in Opinion No. 415, this proceeding arose because section 10.02 of the System Agreement failed to encompass the ERS program. The amendment accepted in Opinion No. 415 cures this defect by defining the parameters that the Entergy Operating Committee must follow in determining whether a unit is eligible for inclusion in Schedule MSS-1. With respect to the refund issue, since we have found that refunds are not appropriate in this proceeding, there was and is no need to quantify damages.

The Commission orders:

State Agencies' request for rehearing is hereby denied.

---

[11] *See* Tr. at 655-56; Ex. S-4 at 6; Ex. ENT-1 at 40-41; Ex. ENT-14 at 41 ("If MSS-1 impacts were a factor in an Operating Company's decision to put a candidate unit into ERS status, the rate and cost impacts of exclusion from MSS-1 may have discouraged Operating Company participation in the ERS program.").

APPENDIX H

CONSTITUTIONAL PROVISIONS

The Commerce Clause (U.S. Const. art. I, § 8, cl. 3):

> The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States and with the Indian Tribes . . . .

The Supremacy Clause (U.S. Const. art. VI, cl. 2):

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

APPENDIX I

STATUTES

16 U.S.C. § 824:

Declaration of policy; application of subchapter

(a) Federal regulation of transmission and sale of electric energy

It is declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this subchapter and subchapter III of this chapter and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.

(b) Use or sale of electric energy in interstate commerce

(1) The provisions of this subchapter shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but except as provided in paragraph (2) shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this subchapter and subchapter III of this chapter, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter.

* * *

(c) Electric energy in interstate commerce

For the purpose of this subchapter, electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof; but only insofar as such transmission takes place within the United States.

(d) "Sale of electric energy at wholesale" defined

The term "sale of electric energy at wholesale" when used in this subchapter, means a sale of electric energy to any person for resale.

(e) "Public utility" defined

The term "public utility" when used in this subchapter and subchapter III of this chapter means any person who owns or operates facilities subject to the jurisdiction of the Commission under this subchapter (other than facilities subject to such jurisdiction solely by reason of section 824i, 824j, or 824k of this title).

* * *

(June 10, 1920, c. 285, § 201, as added Aug. 26, 1935, c. 687, Title II, § 213, 49 Stat. 847, and amended Nov. 9, 1978, Pub.L. 95-617, Title II, § 204(b), 92 Stat. 3140; Oct. 24, 1992, Pub.L. 102-486, Title VII, § 714, 106 Stat. 2911.)

16 U.S.C. § 824d:

Rates and charges; schedules; suspension of new rates; automatic adjustment clauses

(a) Just and reasonable rates

All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or per-

taining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) Preference or advantage unlawful

No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Schedules

Under such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission, within such time and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Notice required for rate changes

Unless the Commission otherwise orders, no change shall be made by any public utility in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after sixty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes

to take effect without requiring the sixty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Suspension of new rates; hearings; five-month period

Whenever any such new schedule is filed the Commission shall have authority, either upon complaint or upon its own initiative without complaint, at once, and, if it so orders, without answer or formal pleading by the public utility, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the public utility affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of such five months, the proposed change of rate, charge, classification, or service shall go into effect at the end of such period, but in case of a proposed increased rate or charge, the Commission may by order require the interested public utility or public utilities to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require such public utility or public utilities to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision

shall be found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the public utility, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

(f) Review of automatic adjustment clauses and public utility practices; action by Commission; "automatic adjustment clause" defined

(1) Not later than 2 years after November 9, 1978, and not less often than every 4 years thereafter, the Commission shall make a thorough review of automatic adjustment clauses in public utility rate schedules to examine—

(A) whether or not each such clause effectively provides incentives for efficient use of resources (including economical purchase and use of fuel and electric energy), and

(B) whether any such clause reflects any costs other than costs which are—

(i) subject to periodic fluctuations and

(ii) not susceptible to precise determinations in rate cases prior to the time such costs are incurred.

Such review may take place in individual rate proceedings or in generic or other separate proceedings applicable to one or more utilities.

(2) Not less frequently than every 2 years, in rate proceedings or in generic or other separate proceedings, the Commission shall review, with respect to each public utility, practices under any automatic adjustment clauses of such

utility to insure efficient use of resources (including economical purchase and use of fuel and electric energy) under such clauses.

(3) The Commission may, on its own motion or upon complaint, after an opportunity for an evidentiary hearing, order a public utility to—

(A) modify the terms and provisions of any automatic adjustment clause, or

(B) cease any practice in connection with the clause,

if such clause or practice does not result in the economical purchase and use of fuel, electric energy, or other items, the cost of which is included in any rate schedule under an automatic adjustment clause.

(4) As used in this subsection, the term "automatic adjustment clause" means a provision of a rate schedule which provides for increases or decreases (or both), without prior hearing, in rates reflecting increases or decreases (or both) in costs incurred by an electric utility. Such term does not include any rate which takes effect subject to refund and subject to a later determination of the appropriate amount of such rate.

(June 10, 1920, c. 285, § 205, as added Aug. 26, 1935, c. 687, Title II, § 213, 49 Stat. 851, and amended Nov. 9, 1978, Pub.L. 95-617, Title II, §§ 207(a), 208, 92 Stat. 3142.)

16 U.S.C. § 824e.

Power of Commission to fix rates and charges; determination of cost of production or transmission

(a) Unjust or preferential rates, etc.; statement of reasons for changes; hearing; specification of issues

Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or

collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order. Any complaint or motion of the Commission to initiate a proceeding under this section shall state the change or changes to be made in the rate, charge, classification, rule, regulation, practice, or contract then in force, and the reasons for any proposed change or changes therein. If, after review of any motion or complaint and answer, the Commission shall decide to hold a hearing, it shall fix by order the time and place of such hearing and shall specify the issues to be adjudicated.

(b) Refund effective date; preferential proceedings; statement of reasons for delay; burden of proof; scope of refund order; refund orders in cases of dilatory behavior; interest

Whenever the Commission institutes a proceeding under this section, the Commission shall establish a refund effective date. In the case of a proceeding instituted on complaint, the refund effective date shall not be earlier than the date 60 days after the filing of such complaint nor later than 5 months after the expiration of such 60-day period. In the case of a proceeding instituted by the Commission on its own motion, the refund effective date shall not be earlier than the date 60 days after the publication by the Commission of notice of its intention to initiate such proceeding nor later than 5 months after the expiration of such 60-day period. Upon institution of a proceeding under this section, the Commission shall give to the decision of such proceeding the same preference as provided under section 824d of this title and otherwise act as speedily as possible. If no final decision is rendered by the

refund effective date or by the conclusion of the 180-day period commencing upon initiation of a proceeding pursuant to this section, whichever is earlier, the Commission shall state the reasons why it has failed to do so and shall state its best estimate as to when it reasonably expects to make such decision. In any proceeding under this section, the burden of proof to show that any rate, charge, classification, rule, regulation, practice, or contract is unjust, unreasonable, unduly discriminatory, or preferential shall be upon the Commission or the complainant. At the conclusion of any proceeding under this section, the Commission may order the public utility to make refunds of any amounts paid, for the period subsequent to the refund effective date through a date fifteen months after such refund effective date, in excess of those which would have been paid under the just and reasonable rate, charge, classification, rule, regulation, practice, or contract which the Commission orders to be thereafter observed and in force: *Provided*, That if the proceeding is not concluded within fifteen months after the refund effective date and if the Commission determines at the conclusion of the proceeding that the proceeding was not resolved within the fifteen-month period primarily because of dilatory behavior by the public utility, the Commission may order refunds of any or all amounts paid for the period subsequent to the refund effective date and prior to the conclusion of the proceeding. The refunds shall be made, with interest, to those persons who have paid those rates or charges which are the subject of the proceeding.

(c) Refund considerations; shifting costs; reduction in revenues; "electric utility companies" and "registered holding company" defined

Notwithstanding subsection (b) of this section, in a proceeding commenced under this section involving two or more electric utility companies of a registered holding company, refunds which might otherwise be payable under subsection

(b) of this section shall not be ordered to the extent that such refunds would result from any portion of a Commission order that (1) requires a decrease in system production or transmission costs to be paid by one or more of such electric companies; and (2) is based upon a determination that the amount of such decrease should be paid through an increase in the costs to be paid by other electric utility companies of such registered holding company: *Provided*, That refunds, in whole or in part, may be ordered by the Commission if it determines that the registered holding company would not experience any reduction in revenues which results from an inability of an electric utility company of the holding company to recover such increase in costs for the period between the refund effective date and the effective date of the Commission's order. For purposes of this subsection, the terms "electric utility companies" and "registered holding company" shall have the same meanings as provided in the Public Utility Holding Company Act of 1935, as amended [15 U.S.C.A. § 79 et seq.].

(d) Investigation of costs

The Commission upon its own motion, or upon the request of any State commission whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transmission of electric energy by means of facilities under the jurisdiction of the Commission in cases where the Commission has no authority to establish a rate governing the sale of such energy.

(June 10, 1920, c. 285, § 206, as added Aug. 26, 1935, c. 687, Title II, § 213, 49 Stat. 852, and amended Oct. 6, 1988, Pub.L. 100-473, § 2, 102 Stat. 2299.)

16 U.S.C. § 825e.

Any person, State, municipality, or State commission complaining of anything done or omitted to be done by any licensee or public utility in contravention of the provisions of this chapter may apply to the Commission by petition which shall briefly state the facts, whereupon a statement of the complaint thus made shall be forwarded by the Commission to such licensee or public utility, who shall be called upon to satisfy the complaint or to answer the same in writing within a reasonable time to be specified by the Commission. If such licensee or public utility shall not satisfy the complaint within the time specified or there shall appear to be any reasonable ground for investigating such complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall find proper.

(June 10, 1920, c. 285, § 306, as added Aug. 26, 1935, c. 687, Title II, § 213, 49 Stat. 856.)

Supreme Court, U.S.
FILED
SEP 30 2002
CLERK

No. 02-299

In The
Supreme Court of the United States

ENTERGY LOUISIANA, INC.,

Petitioner,

v.

LOUISIANA PUBLIC SERVICE COMMISSION, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Louisiana

BRIEF OF RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

When a holding company system violates the objective terms of a rate schedule approved by the Federal Energy Regulatory Commission ("FERC") and overcharges one of its subsidiaries, does the Supremacy Clause require a state regulatory commission to pass the excess charges through to retail ratepayers?

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STATUTES

16 U.S.C. §§ 824d,e 11

STATEMENT OF THE CASE

1. Overview. The petitioner, Entergy Louisiana, Inc. ("ELI"), a subsidiary of Entergy Corp. ("Entergy"), seeks a determination that the filed-rate doctrine requires a state ratemaking commission to pass through in retail rates *excess costs* that are assessed to a utility by its holding company parent in violation of the objective requirements of a tariff approved by the Federal Energy Regulatory Commission ("FERC"). The "prudence" determination of the Louisiana Public Service Commission ("Louisiana Commission" or "Commission") examined the reasonableness of ELI's decision to pay costs assessed to it in violation of the unambiguous requirements of the tariff. The case does not involve a reexamination of the FERC's allocation decision or the utility's decision to be part of a holding company system. Instead, the Louisiana Commission's decision enforced the requirements of federal law.

The applicable tariff was approved by the FERC in 1997 after it determined that the Entergy System's Operating Committee ("Entergy") or ("Operating Committee") had violated the preexisting version of a tariff ("Schedule MSS-1") that allocates costs for "available" system capacity among the Entergy Operating Companies. For more than a decade, Entergy assessed charges for mothballed units – those placed in "extended reserve shutdown" ("ERS") – as if these units were "available" to operate. The FERC declared this action a tariff violation, but exercised its discretion not to order refunds. Instead, to remedy the violation, the FERC adopted a new tariff to precisely "define the parameters that the Entergy Operating Committee must follow in determining whether a unit is eligible for inclusion in Schedule MSS-1." [Pet. App. at 164a]. The Operating Committee thereafter declared that

all the ERS units previously included in MSS-1 should continue to be included, without even considering crucial parameters specified by the FERC.

The Louisiana Commission's Order disallows only those costs that were assessed in violation of the tariff. An administrative law judge ("ALJ") and the Louisiana Commission found that the tariff was violated, after a contested hearing on the issue, and that factual finding was not appealed by ELI. Entergy returned the ERS units to service when energy prices soared after 1997, so the issue regarding this tariff violation will not recur. The disallowance involves only a portion of one year's excess ERS payments, which averaged about $1.6 million per year for ELI. [Pet. App. at 141a (FERC computation using 1987-93 data)]. This amount is a fraction of the excess earnings permitted ELI under a Formula Rate Plan that allows the company to "share" profits in excess of its cost of capital. The excess earnings allowed in 1997 were more than $27 million.

2. FERC ERS proceeding. In 1993, in an order approving the merger of Entergy and Gulf States Utilities Company, the FERC instituted an investigation of whether Entergy had violated its System Agreement by treating ERS units as "available" for cost sharing under Service Schedule MSS-1 of the Entergy System Agreement. [*See* Pet. App. at 85a-86a]. That schedule provides the mechanism for equalizing the cost of the System's "available" generating capability among the Entergy Operating Companies.

Paragraph 10.02 of the System Agreement defined the term "available." It required that a unit, to be eligible for cost sharing, have capability that "can be demonstrated and (1) is under the control of the System Operator, or (2)

is down for maintenance or nuclear refueling." [Pet. App. at 89a]. ERS capacity met neither of these conditions. Indeed, the ERS capacity on the Entergy System was placed in storage for an indefinite time period, in a state of ill repair, and required extensive refurbishment to provide electricity to the System. [*Id.* at 123a]. Nevertheless, the Entergy Operating Committee exercised its purported "discretion" to include the units as available for cost sharing. [*Id.* at 125a]. This action increased the cost assessments to ELI and Entergy Mississippi, Inc. in comparison to what the costs otherwise would have been; it benefited Entergy Arkansas, Inc. and Entergy New Orleans, Inc., which had more-than-proportionate ERS capacity. Entergy acted to avoid changes in MSS-1 payments and receipts, which might have required the initiation of retail rate cases. *See Louisiana Pub. Serv. Comm'n v. F.E.R.C.*, 174 F.3d 218, 229 (D.C. Cir. 1999).

After an evidentiary hearing, a FERC administrative law judge determined that Entergy violated a "clear and unambiguous" tariff by unilaterally declaring the ERS units available. [Pet. App. at 124a]. The judge recommended against a refund remedy, however, and instead determined that a new tariff provision should be adopted to "adequately address the treatment of the ERS units" and set out "the parameters of the Operating Committee's discretion." [*Id.* at 151a-52a]. The FERC affirmed this decision, asserting that it could decline to order refunds because its "discretion is at its 'zenith' in fashioning remedies." [*Id.* at 101a]. The United States Court of Appeals for the District of Columbia Circuit affirmed, applying a "'particularly narrow scope of review.'" *Louisiana Pub. Serv. Comm'n v. F.E.R.C.*, 174 F.3d 218, 224 (D.C. Cir. 1999).

3. Louisiana "Formula Rate" proceeding. In 1995, the Louisiana Commission adopted a Formula Rate Plan for ELI, in which the Company agreed to make annual filings with the Commission and adjust rates pursuant to a sharing formula. *Ex Parte Louisiana Power & Light Co.*, Order No. U-20925 (corrected), 1995 La. PUC LEXIS 39 (La. P.S.C. 1995). The plan established a rate of return deadband around the fair rate of return; if ELI's return fell within the deadband, no rate adjustment was required. Above the deadband, rates were lowered by 60 percent of the excess profit amount.

For the period commencing July 1, 1997, ELI filed a revised evaluation report under the Formula Rate Plan showing that it earned 15.04 percent on equity in the 1996 test year. [App. A]. Additionally, ELI and other parties stipulated that the fair rate of return in the rate effective period, commencing July 1, 1997, was 10.5 percent. [App. B]. The deadband around this rate of return was 9.7 to 11.3 percent – 80 basis points above and below the fair return. ELI reduced its rates by about $41 million to flow through to ratepayers 60 percent of the excess earnings above 11.3 percent. Commencing July 1, 1997, its rates remained sufficient to produce earnings about $27 million in excess of 11.3 percent.

Under the stipulation entered by the parties, three issues proceeded to hearing before the ALJ, including "whether payments under the System Agreement for the cost of generating units in Extended Reserve Shutdown should be included or excluded from ELI's revenue requirement." [Pet. App. at 25a]. The evidentiary examination focused on whether Entergy violated the terms of the new tariff adopted by the FERC effective August 5, 1997. Both ELI and the Commission Staff submitted evidence on this issue.

Under the revised tariff, an ERS unit could be considered "available" if it:

> *is in extended reserve shutdown (ERS) with the intent of returning the unit to service at a future date in order to meet Entergy System requirements. The Operating Committee's decision to consider an ERS unit to be available to meet future System requirements shall be evidenced in the minutes of the Operating Committee and shall be based on consideration of current and future resource needs, the projected length of time the unit would be in ERS status, the projected cost of maintaining such unit, and the projected cost of returning the unit to service.*

[Pet. App. at 104a (emphasis in original)].

Soon after the tariff was revised, the Operating Committee met and declared that all "units currently in ERS status should continue to be deemed 'available' for the purposes of determining Company Capability, as that term is defined in Section 10.02 of the System Agreement." [9/30/97 Op. Comm. Minutes; App. C]. The minutes of the meeting do not reflect how the Operating Committee considered any parameter in the tariff. An attachment to the minutes indicated that the System would keep the units in ERS status for at least 10 years, with no projected return-to-service date for any unit. [*Id.*, Load and Cap. Forecast, Line 13]. Additionally, the Operating Committee had no information concerning the cost of maintaining the ERS units and incomplete information regarding the cost of returning them to service. As the administrative law judge and the Louisiana Commission found, the Operating Committee was provided "incomplete information contained in a single sheet of paper showing the estimated cost of return to service of the ERS units. . . . " [Pet. App. at 53a].

The Louisiana Commission Staff argued that costs assessed to ELI pursuant to tariff violations should not be assessed to retail ratepayers. Although the FERC decided not to order refunds for the period 1986-97, the Staff contended that the costs included in the 1996 test year could be disallowed because they were assessed in violation of the original FERC tariff. [Pet. App. at 44a]. The Staff also argued that the Operating Committee's perfunctory decision violated the new tariff and costs incurred pursuant to that decision should not be assessed to ratepayers.

As to the 1996 costs, the ALJ and the Commission held that the August 5, 1997 decision of the FERC retroactively validated Entergy's tariff violation, precluding a disallowance of costs assessed prior to that time. [*Id.* at 63a-64a]. With respect to the period after August 5, 1997, the ALJ and the Commission determined that Entergy's compliance with the new tariff, and the prudence of ELI in accepting costs assessed to it under the new tariff, could be examined. [*Id.* at 72a]. In that connection, they found that Entergy *again* violated the System Agreement. The judge and Commission determined that the Operating Committee made no serious effort to even consider the new parameters laid out by the FERC:

> The evidence does not show that the Operating Committee made efforts necessary to ascertain that ERS units would be needed within the next 10 years. The Operating Committee did not even seek the information necessary to reach a well-considered decision. The evidence shows that the Operating Committee failed to obtain the requisite data in order to reach a decision "based on consideration of current and future resource needs, the projected length of time the unit would be in ERS status, projected cost of maintaining such unit, and the projected cost of returning the unit to service."

[Pet. App. at 74a].

The judge and the Commission determined that ELI was imprudent for failing to minimize costs assessed to it in violation of the tariff. Thus, it ordered that "MSS-1 overpayments incurred on or after August 6, 1997 be removed from the company's calculation of its cost of service and credited back to the ratepayers." [*Id.* at 77a]. The disallowance affected only a portion of the rate-effective year, which began July 1, 1997.

4. Louisiana state court appeal. After litigating the tariff violation issue before the Louisiana Commission, ELI argued in the Louisiana state courts that the Commission could not disallow costs assessed by the Operating Committee or even consider whether the tariff was violated. The courts rejected these contentions. A state court judge ruled that "the Public Service Commission was neither arbitrary nor capricious in its finding that Entergy could not pass on the ELI overpayment to Louisiana customers." [Pet. App. at 22a]. A majority of the Louisiana Supreme Court determined that the record both supported the determination that Entergy violated the FERC tariff and was "devoid of any attempt by ELI to minimize its costs." [*Id.* at 20a]. Thus, the court affirmed the Louisiana Commission's ruling. [*Id.* at 20a-21a].

REASONS FOR DENYING THE WRIT

The action of the Louisiana Commission does not offend the "filed-rate" doctrine; rather, it is consistent with numerous federal and state decisions holding that issues

of tariff compliance are not within the exclusive jurisdiction of the regulatory agency that approved the tariff. Neither a court nor a state commission may contest the reasonableness of a FERC tariff, but they may determine whether the terms of the tariff were followed in assessing costs to affected parties. In this case, the Louisiana Commission found that Entergy violated the objective "parameters" established by the FERC. [Pet. App. at 104a]. In that situation, any reasonable, independent utility would refuse to pay the overcharge. Since ELI is bound by the prudence standard regardless of its affiliation with a parent, it is required to reasonably minimize costs and was correctly deemed imprudent for accepting the overcharge.

The Louisiana Commission's Order does not conflict with decisions of this Court because it does not contest a FERC cost allocation. Instead, it is consistent with rulings of this and other courts that the filed-rate doctrine does not prevent a court or state agency from determining whether a party violated a tariff. The prudence determination – a failure to minimize costs in the face of an excessive bill – is nothing like the cases relied on most prominently in the petition. In *Mississippi Power & Light Co. v. Mississippi*, 487 U.S. 354, 108 S. Ct. 2428 (1988) ("*MP&L*"), for instance, a state sought to review the reasonableness of costs already deemed "just and reasonable" by the FERC. In *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 106 S. Ct. 2349 (1986), a state agency sought to countermand a FERC power allocation. Here, the Louisiana Commission accepted and applied the terms of the FERC tariff.

The new rule ELI seeks would require a state agency to pass through costs assessed under a utility's interpretation

of a FERC tariff, even when the "interpretation" violates the tariff's objective terms. Under this proposed version of the filed-rate doctrine, the state agency would be bound to pass through the effects of *the utility's* cost misallocation and required to seek discretionary refunds from the FERC. This rule would unduly burden state regulators, delay justice to ratepayers, and undermine the traditional boundaries of state and national power in the federal system.

Contrary to ELI's claims, the issue here has little importance. The ERS program has concluded because spiraling energy prices after 1997 caused Entergy to place the ERS units in service. Thus, the tariff compliance issue has not recurred. The decision disallows only about $1.5 million from rates in a year in which $27 million of excess earnings were permitted in rates. ELI's perception that the Louisiana Commission harbors an "overall strategic plan" to threaten "the regime of the Federal Power Act" is baseless, but in any event this Court should not hear cases based on a petitioner's suspicion. [Pet. at 25]. Thus, the petition does not warrant review.

I. THE LOUISIANA COMMISSION'S ORDER DOES NOT CONFLICT WITH THIS COURT'S RULINGS, BUT INSTEAD IS CONSISTENT WITH PRECEDENTS HOLDING THAT THE FILED-RATE DOCTRINE DOES NOT REQUIRE THAT ISSUES OF TARIFF COMPLIANCE BE DECIDED ONLY BY THE AGENCY WITH AUTHORITY TO APPROVE THE TARIFF.

In claiming that the Louisiana Commission's Order conflicts with decisions of this Court, ELI confuses the prudence inquiry in the preemption cases it cites with the

prudence inquiry here. In *Mississippi Power & Light Co. v. Mississippi*, 487 U.S. 354, 108 S. Ct. 2428 (1988) ("*MP&L*"), the Mississippi Supreme Court directed the Mississippi Public Service Commission to review the prudence of costs already found "just and reasonable" by the FERC. Since the FERC had exclusive jurisdiction to determine the prudence of the costs reflected in the tariff, this Court held that the state could not reexamine the correctness of its decision to include the costs. *Id.* at 2438. Similarly, in *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 106 S. Ct. 2349 (1986), the Court held that a state agency in setting retail rates may not reexamine the fairness of an affiliate power allocation that is imposed by the FERC under a wholesale tariff. *Id.* at 970.

In both of these cases, the Court precluded state agencies from questioning the prudence of costs assessed among affiliates *in compliance with* a FERC-approved rate. The decisions recognize that the Federal Power Act grants the FERC exclusive jurisdiction to establish wholesale rates; this "filed-rate" doctrine "binds both state and federal courts and is in the former respect mandated by the Supremacy Clause." *MP&L*, 487 U.S. at 371-72. But this Court has never held that the FERC must determine the consequences of a tariff *violation*. Indeed, the filed-rate doctrine does not reserve the issue of tariff compliance to the exclusive jurisdiction of the rate-setting agency.

Nothing in the Federal Power Act requires that the FERC decide whether a FERC tariff has been violated. Sections 205 and 206 of the Federal Power Act provide exclusive jurisdiction to the FERC to determine just and reasonable wholesale rates; Section 206 permits the FERC to make refunds for a limited period after the filing of a Complaint upon an ultimate finding that the filed rate was

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not reasonable. 16 U.S.C. §§ 824d, 824e. The FERC has exercised the inherent power to provide refunds for tariff abuse, but that power is not specifically delegated in the statute. *See, e.g., Concord v. F.E.R.C.*, 293 U.S. App. D.C. 374, 955 F.2d 67, 73 (1992) (power to correct abuses "inferred" from general power to carry out purposes of the Act). This exercise of jurisdiction does not displace the power of courts and state agencies to consider disputes that come within their jurisdiction concerning tariff violations.

The power of a state court to interpret and apply a tariff was upheld by this Court when an elevator company sued in state court to recover costs that it alleged were assessed in violation of a tariff approved by the Interstate Commerce Commission. *Great N. R. Co., v. Merchants Elevator Co.*, 259 U.S. 285, 42 S. Ct. 477 (1922). The state courts construed the tariff and determined whether the charge was correctly assessed. This Court affirmed, holding that the tariff construction did not have to be determined by the ICC. It noted that the parties conceded the "validity of the tariff." *Id.* at 290. Further, although rate uniformity was a purpose of the Interstate Commerce Act, uniformity could be preserved through the process of appellate review. Thus, the Court determined that "the attainment of uniformity does not require that in every case where the construction of a tariff is in dispute, there shall be a preliminary resort to the Commission." *Id.* at 291. Instead, unless the matter requires the exercise of specialized agency expertise concerning the "peculiar meaning" of words, the state courts may construe a tariff. *Id.* at 292, 294.

The dividing line between reexamining and applying a tariff has been recognized by the lower federal courts in

resolving tariff disputes. For instance, before it merged with Entergy, Gulf States Utilities withheld payments to Alabama Power Co. and filed suit in federal court, claiming that it should not have to purchase electricity from that utility under a FERC-approved contract. *Gulf States Utilities Co. v. Alabama Power Co.*, 824 F.2d 1465 (5th Cir. 1987). The defendant argued that only the FERC, not the courts, had jurisdiction because the contracts were filed with and approved by the FERC. [*Id.* at 1470]. The Fifth Circuit held that the Federal Power Act only preempted areas "reserved exclusively for the FERC." [*Id.*]. The Act preempts courts and regulators only from "changing the filed rate," "impos[ing] a rate different from the filed rate" or changing a "FERC allocation." [*Id.*]. But the court held that the doctrine did not prevent a determination that a utility billed excessive costs under a tariff. It said:

> Finally, GSU complains that Southern has sold more than it should have under Schedule E by overstating the amount of available "Long Term Power." The FPA does not preempt this claim. Unlike Hall in *Arkla*, GSU does not seek relief based on a rate different from the filed rate. Rather, GSU complains about the quantity sold *at the filed rate* under Schedule E. . . .
>
> *Id.* at 1472.

In a recent decision of the United States Court of Appeals for the Ninth Circuit, a communications carrier argued that the "filed-rate doctrine" prevented a federal district court from determining whether the carrier violated a tariff approved by the Federal Communications Commission. *Brown v. MCI WorldCom Network Services, Inc.*, 277 F.3d 1166 (9th Cir. 2002). The Court found that the matter did not have to be heard at the FCC: "The filed-rate

doctrine precludes courts from deciding whether a tariff is reasonable, but it does not preclude courts from interpreting the provisions of a tariff and enforcing the tariff." *Id.* at 1171.

Other courts have recognized the distinction between applying a tariff and determining its reasonableness. The filed-rate doctrine does not require that the rate-setting agency determine whether a tariff has been violated. *See, e.g., United States v. Garner*, 134 F. Supp. 16, 18 (E.D.N.C. 1955) ("It is well settled that federal and state courts may entertain actions by shippers to recover freight charges which are in excess of those stated in tariffs duly and properly filed with the Commission, and in such actions the courts may decide questions of construction of tariffs as legal documents."); *Consolidated Terminal Systems, Inc. v. ITT World Communications, Inc.*, 535 F. Supp. 225, 233 (S.D.N.Y. 1982) (Appropriateness of referral to FCC "turns on whether the tariff is being challenged, in which the primary jurisdiction referral is appropriate, or whether it is simply alleged that the tariff is being violated, where the referral is inappropriate."); *Southern Pacific Transp. Co. v. San Antonio,* 748 F.2d 266, 272 (5th Cir. 1984) ("[C]ourts often interpret the terms of a filed rate but refer to the I.C.C. any questions concerning the reasonableness of that rate.").

A number of state courts also have determined that the "filed-rate" doctrine does not prevent courts from determining whether a party followed the terms of a tariff. *See, e.g., Union Pac. R. R. v. Structural Steel & Forge Co.*, 344 P.2d 157, 160 (Utah, 1959) ("Since the words in the tariff are used in their ordinary meanings, their construction is a matter of law; uniformity in that construction can be guaranteed by the Supreme Court. The state court can

apply that legal construction to a state cause of action." (citations omitted)); *Pennsylvania R. Co. v. Nasshorn*, 116 N.Y.S. 2d 365 (N.Y. App. Div. 1952) (application of tariff classification is issue for courts); *Pennsylvania R. Co. v. Chromcraft Corp.*, 424 S.W.2d 104, 106 (Mo. Ct. App. 1967) ("Where . . . the issue between a shipper and a carrier is not the reasonableness of a rate but only the construction or interpretation of a published tariff the courts, including a state court, may entertain jurisdiction."). Since state courts may perform this function, so may a state agency.

The federal and state courts also have applied a "primary jurisdiction" doctrine, which permits them to defer in the exercise of their jurisdiction when the interpretation of a tariff requires special expertise presumably residing in the rate-setting agency. Thus, courts may defer when the issue is not within "the conventional experience of judges," but rather involves technical or policy considerations that first must be decided by the agency to protect a regulatory scheme. *National Communications Ass'n v. AT&T Corp.*, 46 F.3d 220, 222 (2d Cir. 1995); *Brown v. MCI Worldcom Network Services, Inc.*, 277 F.3d 1166 (9th Cir. 2002). Assuming this doctrine applies to the states through the Supremacy Clause, it should be invoked only when a case presents a far-reaching and technical issue, central to a regulatory regime.

In this case, the FERC established straightforward terms to govern a narrow issue arising under the Entergy System Agreement. Entergy proceeded to bill ERS costs to ELI without making any reasonable effort to comply with the objective requirements of the tariff. The Louisiana Commission's Order accepts the tariff and its requirements. The terms are neither technical nor imbued with policy ramifications, and determining their meaning does

not require specialized expertise. Thus, neither the filed-rate doctrine nor the doctrine of primary jurisdiction precludes the Louisiana Commission from considering the tariff violation. Indeed, ELI has neither invoked the doctrine of primary jurisdiction nor contended that the FERC tariff involves issues outside the conventional experience of state regulators.

The prudence determination of the Louisiana Commission is grounded in state, not federal, law. The Commission simply determined that ELI did not act reasonably to minimize its costs when presented with excessive charges billed in violation of a FERC tariff. Under Louisiana law, a utility is obligated to provide service to customers at the lowest reasonable cost. The Louisiana Supreme Court articulated the standard in *Gulf States Utilities Co. v. Louisiana Pub. Serv. Comm'n*, 689 So. 2d 1337 (La. 1997), a case involving the prudence of fuel charges incurred by a utility. It said:

> Because ratepayers have only one power supplier, they are dependent on that supplier's management to make reasonable attempts to minimize costs through prudent decisionmaking. Therefore, the proper standard for determining whether a utility was imprudent is whether objectively that utility acted reasonably under the circumstances, because only the utility, and not the ratepayer, is in a position to minimize imprudence and maximize efficiency . . . .
>
> *Id.* at 1346.

Any reasonable utility, faced with an overcharge from a supplier, would refuse to pay the bill. If the seller believed the charge was correct, it would be required to file a suit to compel payment. Because ELI is a subsidiary of

Entergy, it accepted the excessive charge. But ELI's affiliation with Entergy does not absolve it of the prudence obligation. ELI, like an independent utility, was required to resist the unlawful charge. Its failure to do so violated the prudence standard.

A prudence disallowance for failing to object to charges billed in violation of a FERC tariff is nothing like a determination that the tariff itself unreasonably allocates costs. The *MP&L* determination, for instance, precludes a state commission from reexamining the prudence of costs that have already been included in rates by the FERC. *Mississippi Power & Light Co. v. Mississippi,* 487 U.S. 354, 108 S. Ct. 2428 (1988). Thus, the Court determined that states "may not bar regulated utilities from passing through to retail customers *FERC-mandated* wholesale rates." *Id.* at 372 (emphasis added). But *MP&L* does not require the state agency to accept and pass through excessive charges billed in violation of the tariff – say, if Grand Gulf costs properly charged to another company had been billed to MP&L. Indeed, the Court indicated that a state agency might well be entitled to question a utility's decision to buy high-cost power "if it had the legal right to refuse to buy that power." *Id.* at 373-74.

Similarly, *Nantahala* requires a state commission to accept an allocation of power mandated by the FERC, but it does not require acceptance of an over-allocation imposed by a parent in violation of the clear terms of the tariff. *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 106 S. Ct. 2349 (1986). The key finding in *Nantahala* was that "Nantahala could not have treated itself as having access to any more low-cost entitlement power than it is eligible to include under FERC's interpretation

of what would be a fair allocation." *Nantahala*, 476 U.S. at 972-73. The North Carolina allocation was preempted because it conflicted with the FERC's determination, not because it conflicted with a parent's decision to improperly interpret a FERC tariff.

Construing *MP&L* and *Nantahala* to cover Entergy's self-serving tariff interpretation would give preemptive standing to a *breach* of federal law. Congress could not have intended the Federal Power Act, created to fill a "gap" because the states could not regulate interstate transactions, as precluding a state from disallowing an illegal charge imposed by a parent and accepted by a retail utility. *See Arkansas Elec. Coop. Corp. v. Arkansas Public Serv. Comm'n*, 461 U.S. 375, 377-80, 103 S. Ct. 1905 (1983) (Congress in enacting the Federal Power Act sought to fill regulatory gap resulting from Commerce Clause limitation on state power). The Louisiana Commission's prudence determination focused on the subsidiary's conduct and is not unlike many other decisions made at retail concerning holding company cost misallocations. If ELI believed that the charge was mandated by the FERC, it could have appealed the underlying ruling. But ELI made no effort to appeal that determination.

Nor does the existence of *New Orleans Pub. Serv. Inc. v. Council of New Orleans*, 911 F.2d 993 (5th Cir. 1990) ("*NOPSI*"), provide a reason for the Court to review this case. Whether *NOPSI* was inconsistent with *Nantahala* or not, the case was settled long ago. Entergy did not deem the decision of sufficient "national importance" to pursue review in this Court at the time rather than settling it. *NOPSI* did not involve a tariff violation, but a decision assertedly at odds with the FERC–mandated allocation of

Grand Gulf. Thus, it does not support the claim that this case merits review.

Undoubtedly ELI would argue that its proposal to preclude state agencies from interpreting tariffs would not require an agency to accept an excessive charge permanently, since a commission could file a complaint and seek relief at the FERC. But imposing this requirement would unduly burden state regulators. The expense of filing and litigating a complaint case in Washington, D.C. to obtain a discretionary remedy for a tariff violation may be prohibitive in many cases. Moreover, the FERC may delay setting a case for hearing for many years; the delay may preclude timely relief and in some cases prevent relief to the consumers who were forced to pay an overcharge. The Supremacy Clause is not designed to impose these unnecessary burdens.

The extent of the potential burden may be illustrated by reference to the history of a FERC Complaint Case filed by the Louisiana Commission. In 1995, the Louisiana Commission alleged that the Entergy System Agreement was discriminatory for its failure to provide credit for interruptible loads in allocating capacity costs. Since interruptible loads may be interrupted at times of peak load, they do not cause a need for new generating capacity, and under FERC precedent should not be assigned capacity costs. The FERC delayed acting on the complaint for more than a year and then dismissed it in an opinion later deemed "quintessentially arbitrary and capricious" by the United States Court of Appeals for the District of Columbia Circuit. *Louisiana Pub. Serv. Comm'n v. F.E.R.C.*, 184 F.3d 892, 897 (D.C. Cir. 1999). The FERC also delayed acting on the obligatory application for rehearing for about a year. After a remand from the court of appeals, the

FERC again delayed acting for more than a year. When the Louisiana Commission sought mandamus relief in the court of appeals, the FERC suggested that it had discretion in ordering its priorities to delay hearing the case for *four to ten years*. [FERC Response at 6 n.1, *Louisiana Pub. Serv. Comm'n v. F.E.R.C.*, No. 97-1661 (D.C. Cir.) (App. D)]. The FERC set the case for hearing in late 2000 – five years after it was filed – only when the Louisiana Commission sought mandamus relief in this Court, after the court of appeals denied the writ. *Louisiana Pub. Serv. Comm'n v. F.E.R.C.*, No. 00-405. The matter is currently before the FERC after an Initial Decision of an ALJ that was rendered more than a year ago.

Adopting the rule proposed by ELI would require state officials to accept an illegal charge, flow it through to ratepayers, and expend valuable resources seeking to correct the violation. It would largely insulate affiliate systems from the consequences of their own misconduct and limit the scope of the prudence obligation for these, as opposed to independent, companies. No valid basis exists to expand the filed rate doctrine to include incorrect affiliate "interpretations" within its scope.

ELI also argues that the *Pike County* line of cases, relied on by the Louisiana Supreme Court, is inapplicable to justify the prudence disallowance in this case. [Pet. at 16-17]. Admittedly, the facts are different, but the principle still applies. In *Pike County*, a court determined that a state agency was not precluded from reviewing the prudence of a subsidiary's decision to enter a power arrangement with its parent under a contract regulated by the FERC, rather than pursuing available market alternatives. *Pike County Light & Power Co. v. Pennsylvania Pub. Util. Comm'n*, 465 A. 2d 735 (Pa. Cmwlth. 1983). Since the

prudence of the choice to enter the contract in the first place was not a matter exclusively within the FERC's jurisdiction, the state agency review was not precluded by the Supremacy Clause. Here, the case is much stronger. The utility chose to accept an overcharge assessed in violation of a FERC tariff. Its "choice" may have been influenced by the parent-subsidiary relationship, but it was not mandated by the FERC. Reviewing the prudence of this choice is a matter within the traditional purview of the states.

The ruling of the Louisiana Supreme Court does not conflict with decisions of this Court or the Supremacy Clause. The Louisiana Commission's disallowance conformed ELI's costs with the objective terms of a FERC tariff. This determination does not violate federal law.

II. THE PETITION PRESENTS AN UNUSUAL, NONRECURRING ISSUE OF SMALL CONSEQUENCE THAT IS NOT WORTHY OF THIS COURT'S CONSIDERATION.

The petition offers two grounds for portraying this case as imbued with great national importance. First, it asserts that the role of the FERC in regulating the electric industry under the Federal Power Act has importance and should not be supplanted by the States. [Pet. at 22-24]. Second, it suggests the Louisiana Commission has embarked on an "overall strategic plan" to disrupt the scheme of federal regulation of wholesale power. [Pet. at 25-26]. Neither assertion lends credence to the claim that this case is important. Indeed, the case involves a one-time, nonrecurring disallowance of about $1.5 million of ELI's costs in a year in which the utility was allowed overearnings that swamped the disallowance.

Surely ELI is correct that the electric power industry is important to the nation and electric coordination promotes national interests. Additionally, it is true that the FERC is in the best position to make power and cost allocations that involve conflicting state interests. But the Louisiana Commission did nothing to counter this federal scheme of regulation. It did not "relitigate" the terms of the tariff, but applied the tariff's objective terms and found a violation. That finding cannot be contested now because ELI, after litigating the issue before the Commission, did not raise it on appeal in the state courts. Thus, the Louisiana Commission's ruling accords fully with the requirements of federal law.

Presumably, Entergy's compliance with the tariff's requirements might have been litigated at the FERC. To the extent that avenue practically is available, the decision of the Louisiana Commission does not preclude it. Entergy could have asked the FERC for a declaration that compliance did not really require considering the matters set out in the tariff. But Entergy understandably did not do so, preferring to contend that the Supremacy Clause shields its own abuse from review in a state forum.

Nor is the case itself significant. The disallowance involves only a portion of ELI's annual ERS assessment, which averaged about $1.6 million in previous years. [Pet. App. at 141a]. For the same year, ELI was permitted earnings of $27 million in excess of its rate of return deadband. [App. A]. The disallowance serves only to lower, by a relatively small amount, the level of excess earnings. The *overall* impact of the Order on the utility thus could not be deemed unreasonable. *See Federal Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591, 602, 64 S. Ct. 281, 288 (1944); *Duquesne Light Co. v. Barasch*, 488 U.S. 299,

311, 109 S. Ct. 609, 618 (1989). Additionally, the ERS units were brought into service after 1997, so the tariff violation will not recur. Thus, the issue has no ongoing consequence.

ELI's suspicion of an "overall strategic plan" to undermine "the regime of the Federal Power Act" does not merit consideration. First, the quotation of special counsel's comments to the Louisiana Commission in September, 2001 involved the wisdom of commencing a proceeding to examine the propriety of retail utilities giving up control or ownership of transmission assets now in the retail rate base. [App. E]. No utility, including ELI, has contended that issue is outside the Louisiana Commission's authority. The Louisiana Commission commenced a proceeding to examine the issue, and no party has contended that the issues are preempted.

Second, the Louisiana Commission's institution of a retail proceeding to investigate issues relating to the System Agreement – including huge cost differences revealed in 2001 in a FERC proceeding – in itself does no more than permit the acquisition of evidence. The Louisiana Commission also has filed a Complaint and sought relief at the FERC for the discriminatory cost allocation. Should the Louisiana Commission ever issue an Order that assertedly conflicts with FERC jurisdiction, the Court may consider the propriety of the decision in *that case*. Predicting the outcome, and examining the constitutionality of the prediction, is not an efficient use of the Court's resources.

In this case, the Louisiana Commission found a utility imprudent for failing to resist a violation of a FERC tariff. Even if that ruling could violate the filed rate doctrine, it involved a relatively small issue that will not recur unless

other utilities follow Entergy's unlawful lead. Thus, the issue is not worthy of review.

CONCLUSION

The Order of the Louisiana Commission fully accepted the requirements of Entergy's FERC tariff for the purpose of determining whether ELI's inaction was prudent. ELI was found wanting because it failed to resist the tariff violation. Thus, the ruling is consistent with federal law. Additionally, the issue has little importance and is not likely to recur. Therefore, the writ should be denied.

Respectfully submitted,

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September 30, 2002

APPENDIX A

Section 2
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2/19/98

Entergy Louisiana, Inc.
Evaluation Period Revenue Adjustment
($000's Omitted)

Line No.		Amount		Reference
1	**Formula Rate Plan Revenue Adjustment (1)**		**(57,819)**	
	Waterford 3 Revenue Adjustment (2)			
2	Property Tax – 1995 FRP Revenue Rqmt	(31,325)		WP 14-4
3	Property Tax – Actual Tax Paid Revenue Rqmt	18,257		WP 14-1
4	Waterford 3 O&M Deferral Termination	(10,378)		WP 14-2
5	Sub-Total	(23,446)		
6	LPSC Retail Allocation Factor	98.188%		WP 14-9
7	Sub-Total Waterford 3 Adjustment – LPSC Retail		(23,021)	

8	Waterford 3 Property Tax True-Up – LPSC Retail	(3,723)	WP 14-6
9	**Total Waterford 3 Revenue Adjustment**	**(26,744)**	
10	**Net Revenue Adjustment for the Evaluation Period**	**(84,563)**	

Note:

(1) See Section 2, Page 2 for the development of the revenue adjustment prepared in accordance with Attachment G of Rider Schedule FRP.

(2) Prepared in accordance with LPSC Order U-20925-B.

APPENDIX B

App. 3

ENTERGY LOUISIANA INC
RIDER FRP REVENUE REDETERMINATION FORMULA
EVALUATION PERIOD ENDED DECEMBER 31, 1996
($000 OMITTED)

SECTION 1

BANDWIDTH CHECK FOR RATE SCHEDULE FRP

LINE NO	DESCRIPTION	REFERENCE		
1	Earned Rate of Return on Common Equity	Section 3, Page 1, Line 24		15.04%
2	Evaluation Period Cost Rate For Common Equity	Section 4		10.50%
3	Customer Satisfaction Rating Adjustment	Section 5		0.00%
4	Performance Adjusted Cost for Common Equity	Line 2 + Line 3		10.50%
5	If Line 4 + 0.8% < Line 1	11.30%	TRUE	GO TO Section 2
6	If Line 4 – 0.8% > Line 1	9.70%	FALSE	
7	Otherwise			No Rate Change

SECTION 2

UPPER BAND RATE ADJUSTMENT

	DESCRIPTION	REFERENCE		
8	Earned Rate of Return on Common Equity	Line 1	15.04%	
9	Upper band	Line 4 + 0.8%	11.30%	
10	Reduction to Upper Band	Line 8-Line 9	3.74%	
11	Reduction in Earned Rate of Return on Common Equity	60% of Line 10		2.24%
12	If Line 11 ≤ 0.05%			No Rate Change
13	If Line 11 > 0.05%			
14	Reduction in Earned Rate of Return on Common Equity	Line 11		2.24%
15	Common Equity Capital Ratio	Section 6, Line 5, Column B		41.37%
16	LPSC Retail Rate Base	Section 3, Page 1, Line 19		$2,708,048
17	Revenue Conversion Factor	Section 3, Page 1, Line 16		1.6350
18	Reduction in Rider FRP Revenue	Line 14 * Line 15 * Line 16 * Line 17		$41,030

SECTION 3

LOWER BAND RATE ADJUSTMENT

	DESCRIPTION	REFERENCE	
19	Lower Band	Line 4 – 0.8%	%
20	Earned Rate of Return on Common Equity	Line 1	%
21	Increase to Lower Band	Line 19 – Line 20	%

22	Increase in Rate of Return on Common Equity	60% of Line 21	%
23	If Line 22 ≤ 0.05%		No Rate Change
24	If Line 22 > 0.05%		
25	Increase in Rate of Return on Common Equity	Line 22	%
26	Common Equity Capital Ratio	Section 6, Line 5, Column B	%
27	LPSC Retail Rate Base	Section 3, Page 1, Line 19	$
28	Revenue Conversion Factor	Section 3, Page 1, Line 16	
29	Increase in Rider FRP Revenues	Line 25 * Line 26 * Line 27 * Line 28	$

SECTION 4

TOTAL RIDER FRP REVENUE

	DESCRIPTION	REFERENCE	
30	Annualized Evaluation Period FRP Revenue	Section 10, Page 10-1-28	($16,789)
31	Reduction/Increase in Rider FRP Revenues	- Line 18 or + Line 29	($41,030)
32	Total Rider FRP	Line 30 + Line 31	($57,819)

NOTE:
(1) Prepared in accordance with Attachment G of Rider Schedule FRP.

EXHIBIT
JOINT # 2

STONE, PIGMAN, WALTHER,
WITTMANN & HUTCHINSON, L.L.P.
COUNSELLORS AT LAW
546 CARONDELET STREET
NEW ORLEANS, LOUISIANA 70130-3535
(504) 581-3200
FAX (504) 581-3361

FAX COVER LETTER

File Number: 38,019

TO: Margot G. Augustin, Esq. FAX NO.: 576-5579

FROM: Paul L. Zimmering, Esq. CONFIRMATION NO.: 576-2764

DATE: February 6, 1998 TIME: _____

Total number of pages, including this cover page: 7

IF YOU DO NOT RECEIVE ALL PAGES, PLEASE TELEPHONE (504) 581-3200 EXT. 414 OR EXT. 638 AS SOON AS POSSIBLE.

COMMENTS: _____

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Thank you.

Return To: PLZ

J. Wayne Anderson
Legal Services
Deputy General Counsel
Regulatory

January 30, 1998

VIA FACSIMILE AND U.S. MAIL

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Mr. John Chavanne
P.O. Box 807
New Roads, Louisiana 70760-0807

Re: LPSC Docket No. U-20925 (1996 and 1997 FRP proceedings)

Dear Counsel:

Pursuant to the conversations among Mike Fontham, Paul Zimmering, Randy Young, John Chavenne, and me, this letter agreement documents the following stipulation by the Louisiana Public Service Commission ("LPSC"), Entergy Louisiana, Inc. ("Entergy Louisiana" or "Company"), the Louisiana Energy Users Group ("LEUG"), and Marathon Oil Company ("Marathon") regarding the resolution of certain issues that have been addressed in Entergy Louisiana's first and second annual Formula Rate Plan proceedings (the "1996 FRP proceeding" and "1997 FRP proceeding," respectively):

1. **Authorized Rate of Return on Common Equity.** The authorized rate of return on common equity approved by the Commission in the 1996 FRP proceeding (10.5%) will be implemented through a prospective adjustment applied as provided in the Formula Rate Plan.

Further, that same authorized rate of return on common equity will be used in the 1997 FRP proceeding, and as part of this settlement, the Company will not oppose the issuance of a credit, the effect of which would be to apply, effective July 1, 1997, that authorized rate of return on common equity in the calculation of the rate adjustments required by the Formula Rate Plan. The Company agrees to this with a full reservation of its rights in future Formula Rate Plan proceedings, and notwithstanding its position that such retroactive application is not appropriate pursuant to the Formula Rate Plan under the circumstances of this case.

Additionally, that same ROE will be the approved ROE for purposes of the 1998 FRP proceeding and will be reflected in the Company's 1998 FRP filing, if an FRP filing is made by the Company in 1998.

2. **Capital Structure (gross vs. net proceeds of debt).** In consideration of Company's agreement with respect to item 1 above, the Commission agrees that it will not rule on the capital structure issue in the 1996 FRP proceeding, agrees that the record developed in the 1996 FRP proceeding with respect to the capital structure issue will be merged with the record developed in the 1997 FRP proceeding with respect to that same issue, agrees that the testimony and evidence on this same issue developed in the 1997 proceeding will be completed in accordance with the current schedule for the 1997 proceeding, and agrees that the issue will be tried during the February 1998 hearing currently scheduled to commence on February 16, 1998. The Commission's decision on this issue in the 1997 FRP proceeding, based on the record of the hearing conducted in February 1998, will be effective prospectively only from the date of the Commission's order.

3. **Other issues in the 1996 FRP proceeding**. The Commission's decision as it relates to all other issues in the 1996 FRP proceeding will be applied prospectively following the issuance of an order by the Commission in calculating the amount of the resulting rate adjustment to be implemented pursuant to the 1996 FRP proceeding. The correction to the LIPS rate adjustment, however, will be applied retroactively effective July 1, 1996.

4. **MSS-1 Billings**. This stipulation does not address issues relating to MSS-1 billings to the Company under the System Agreement, and shall have no effect upon the litigation or resolution of such issues in the 1997 FRP proceeding.

5. **Other issues in the 1997 FRP proceeding**. All other issues in the 1997 FRP proceeding will be settled as follows, and except as specifically provided herein below, will be implemented prospectively following the issuance of an order by the Commission approving the terms of this settlement:

   a. **Restructuring costs**. Restructuring costs accrued, but not expended, in the 1996 evaluation period (having a value of $1.553 million) will be removed from the Company's revenue requirement for purposes of adjusting rates pursuant to the Formula Rate Plan. This adjustment will be applied effective July 1, 1997.

   b. **SERI rate increase**. This issue will be resolved in accordance with the provisions of the Proposed SERI Refund Procedure, a copy of which is attached hereto and made a part hereof.

   c. **SFI Period Costs**. Issues relating to the Company's SFI Period Costs will have no effect on the rate adjustments implemented pursuant to the 1997 FRP proceeding.

   d. **Other issues**. No adjustment will be made with respect to any other issues raised in the 1997 FRP proceeding.

Please indicate your agreement with the stipulations set forth above by executing the jurat below, sending a copy to me via facsimile, and returning the signed original to me, retaining a copy for your records. I will distribute a copy of the executed letters to everyone.

The Company is performing the calculations to lower base rates by means of a rider and to provide the credits with respect to those items that relate to dates past. Assuming that we receive everyone's agreement to this

stipulation, we will have bill inserts printed and believe that we can be ready to implement the prospective reductions by late February, with credits appearing on customer bills approximately one month later.

Sincerely,

/s/ Wayne Anderson
J. Wayne Anderson

Agreed and Accepted:

By: /s/ Paul L. Zimmering
Representing: LPSC Staff

OUTLINE

SERI REFUND PROCEDURE FOR ELI

1. For purposes of the 1997 Rider FRP adjustments, any future Rider FRP filings, and any general rate reviews conducted prior to the issuance of a final FERC order in FERC Docket No. ER95-1042-000 ("SERI Case"), the level of Grand Gulf capacity costs reflected in ELI's base rates shall be the level defined by the FERC Administrative Law Judge's initial Decision issued in the SERI Case on July 11, 1996 ("Interim Grand Gulf Cost Level"). Entergy Louisiana shall defer amounts representing the difference between the interim Grand Gulf Cost Level and the level of Grand Gulf capacity costs actually billed to the Company by SERI pending implementation of a final decision by the FERC.

2. The Rider FRP Rate Adjustments shall be revised to reflect the interim Grand Gulf Cost Level on a prospective basis only, subject to refund or surcharge

upon the implementation of a final decision by the FERC in the SERI case.

3. The Refund/Surcharge Period shall commence on July 1, 1997, the date on which the full amount of the Grand Gulf capacity costs were reflected in ELI's base rates subject to refund or surcharge pending the implementation of a final decision by the FERC in the SERI case, and shall continue until the date revised Rider FRP Rate Adjustments (or other rates) reflecting the final FERC decision in the SERI Case are implemented ("Final Rates").

APPENDIX C

Minutes

Entergy Operating Committee
September 30, 1997
Attendance: 14

Entergy Arkansas, Inc.	1
**Jim Pilgrim	
Entergy Gulf States, Inc.	1
*Karen Johnson	
Entergy Louisiana, Inc.	1
*John Cordaro	
Entergy Mississippi, Inc.	1
*Don Meiners	
Entergy New Orleans, Inc.	1
*Dan Packer	
Entergy Services, Inc.	9
*Frank Gallaher (Chairman)	
Jim Kenney	
Ken Turner	
Louis Buck	
Jim Rider	
Larry Ables	
Bill Aycock	
Bob Hawkins	
Bob Grenfell	

*Committee members
**Proxy for Drake Keith

MINUTES
ENTERGY OPERATING COMMITTEE
September 30, 1997

Mr. Gallaher convened the meeting at 9:00 a.m.

AGENDA

I.
II. '98 Capacity Plan
III. '98 Load & Capability
IV. Extended Reserve Shutdown Units
V.

VI. Next meeting

ITEM I –

ITEM II – '98 CAPACITY PLAN

Ken Turner briefed the Committee on the status of the '98 Capacity Plan. No recommendation was made regarding the '98 capacity plan since the analysis is not yet complete. (Appendix B)

ITEM III – '98 LOAD & CAPABILITY

Ken Turner presented the '98 Load & Capability Forecast to the committee for approval for planning purposes. (Appendix C)

Motion was made by John Cordaro, seconded by Don Meiners that the '98 Load & Capability Forecast be approved, as presented, for planning purposes. Motion passed.

ITEM IV – EXTENDED RESERVE SHUTDOWN UNITS

Ken Turner discussed the Federal Energy Regulatory Commission's ("FERC") recent order adopting the proposed

amendment to Service Schedule MSS-1 intended to address the generating units currently in extended reserve shutdown ("ERS") and the treatment of those units under the System Agreement. The amendment provides, in relevant part, as follows:

> *A unit is considered available to the extent the capability can be demonstrated and (1) is under the control of the System Operator, or (2) is down for maintenance or nuclear refueling, or (3) is in extended reserve shutdown (ERS) with the intent of returning the unit to service at a future date in order to meet Entergy System requirements. The Operating Committee's decision to consider an ERS unit to be available to meet future system requirements shall be evidenced in the minutes of the Operating Committee and shall be based on consideration of current and future resource needs, the projected length of time the unit would be in ERS status, the projected cost of maintaining such unit, and the projected cost of returning the unit to service.*

Based on the information Mr. Turner discussed under agenda items II and III, a motion was made by Don Meiners and seconded by Karen Johnson that the units currently in ERS should continue to be deemed "available" for purposes of determining Company Capability, as that term is defined in Section 10.02 of the System Agreement. Motion passed.

ITEM V

APPENDIX C

ENERGY ELECTRIC SYSTEM
1998 LOAD & CAPABILITY FORECAST
(MW)

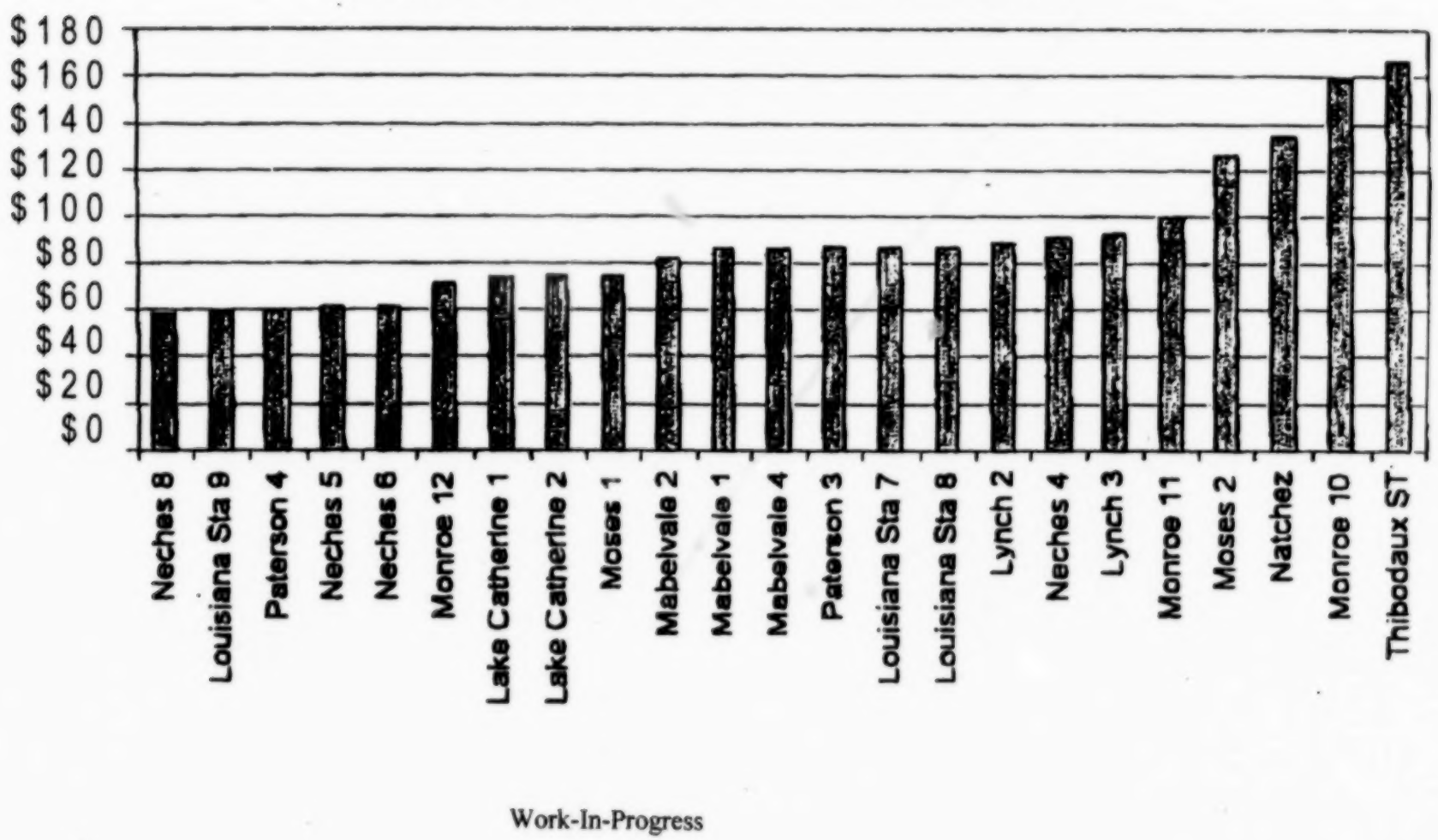
	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007
DEMAND-SIDE REQUIREMENTS										
1. NATIVE LOAD REQUIREMENTS	19,541	19,515	19,787	20,031	20,217	20,366	20,522	20,676	20,859	21,028
2. DEMAND-SIDE RESOURCES	(1,249)	(1,140)	(1,144)	(1,147)	(1,144)	(1,108)	(1,041)	(907)	(908)	(909)
3. FIRM NATIVE LOAD (1+2)	18,292	18,375	18,643	18,884	19,073	19,258	19,481	19,769	19,951	20,119
4. RESERVE REQUIREMENTS	2,744	2,756	2,796	2,833	2,861	2,889	2,922	2,965	2,993	3,018
5. STAND-BY CAPACITY SALES	146	174	175	177	201	231	248	276	298	321
6. CAPACITY SALES W/OP RESERVES	220	220	220	160	160	160	160	160	160	160
7. CAPACITY SALES FROM RESERVES	1,058	1,058	378	350	350	400	400	400	500	500
8. REQUIREMENTS FOR LOAD (3+4+5+6+7)	**22,460**	**22,583**	**22,212**	**22,404**	**22,645**	**22,938**	**23,211**	**23,570**	**23,901**	**24,118**
SUPPLY-SIDE RESOURCES										
9. GENERATION CAPABILITY	22,730	22,743	22,664	22,678	22,678	22,678	22,678	22,678	22,678	22,678
10. ADDITIONS/RETIREMENTS/RERATES	13	(79)	14	0	0	0	0	0	0	0
11. PURCHASES W/O RESERVES	492	491	491	491	491	490	533	890	990	990
12. TOTAL CAPABILITIES (9+10+11)	**23,235**	**23,155**	**23,169**	**23,169**	**23,169**	**23,168**	**23,211**	**23,568**	**23,668**	**23,668**
13. EXTENDED RESERVE SHUTDOWN	(1,284)	(1,284)	(1,284)	(1,284)	(1,284)	(1,284)	(1,284)	(1,284)	(1,284)	(1,284)
14. OPERATIONAL CAPABILITY (12+13)	**21,951**	**21,871**	**21,885**	**21,885**	**21,885**	**21,884**	**21,927**	**22,284**	**22,384**	**22,384**
RESERVE MARGIN										
15. RESOURCE SURPLUS/(DEFICIT) (12-8)	775	572	957	765	524	230	0	(2)	(233)	(450)
16. % RESERVE MARGIN (100*(4+15)/3)	**19.2%**	**18.1%**	**20.1%**	**19.1%**	**17.7%**	**16.2%**	**15.0%**	**15.0%**	**13.8%**	**12.8%**
17. OPERATIONAL SURPLUS/(DEFICIT) (14-8)	(509)	(712)	(327)	(519)	(760)	(1,054)	(1,284)	(1,286)	(1,517)	(1,734)

NOTES:
Line 4. Reflects a 15% target reserve margin.
Line 15. Any resource deficit will be supplied in accordance with the System's Integrated Resource Plan.
Line 17. Operational deficits will be made up through short-term purchases, return-to-service of units on extended reserve shutdown, or other operational actions.

DATE: 09/26/97
Case No. L09117RO

Capacity Alternative - RTS

Proposed Return to Service Units



APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Louisiana Public Service Commission, Petitioner	)	
v.	)	No. 97-1661
Federal Energy Regulatory Commission, Respondent	)	

RESPONSE OF FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION TO LOUISIANA PUBLIC SERVICE COMMISSION'S MOTION TO ENFORCE JUDGMENT ON REMAND OR ALTERNATIVELY PETITION FOR WRIT OF MANDAMUS

Pursuant to Fed. R. App. P. 21(b) and Circuit Rule 21, the Federal Energy Regulatory Commission (the "Commission") submits this response in opposition to the Louisiana Public Service Commission's ("Louisiana PSC") motion to enforce judgment on remand of this Court's decision in *Louisiana Pub. Serv. Comm'n v. FERC*, 184 F.3d 892 (D.C. Cir. 1999) ("*Louisiana PSC*") or, alternatively, to issue a writ of mandamus pursuant to 28 U.S.C. § 1651(a), 5 U.S.C. §§ 555(b), 706(l) and 16 U.S.C. §§ 824d, 824e. As the basis for its request for such extraordinary action, Petitioner claims the Commission has unreasonably delayed acting on the *Louisiana PSC* remand. There are no grounds for such a claim.

* * *

> and (6) the court need not "find any impropriety lurking behind agency lassitude in order to hold that agency action is 'unreasonably delayed.'"

Id. at 80 (citations omitted). As now demonstrated, Petitioner fails to satisfy these criteria.

With regard to the first factor, the seven and one-half months since the Court's mandate issued on September 27, 1999, is well within the "rule of reason."[1] From October 26, 1999 to December 23, 1999, the parties filed pleadings with the Commission containing evidence and argument for the Commission's consideration on remand. Moreover, Louisiana PSC has filed an additional complaint putting before the Commission a request for revisions to the Entergy system agreement in light of retail competition and its impact on cost allocation under the agreement. This in turn has spawned further filings to the Commission. Thus, the Commission must devote time not only to the specific considerations raised by the Court's remand, but to the filings engendered by the remand and

* * *

[1] In contrast, the cases in which mandamus relief has been granted have involved agency delays of years in reaching an initial decision. *See, e.g., MCI Telecomm. Corp. v. FCC*, 627 F.2d 322 (D.C. Cir. 1980) (four year delay); *Nader v. FCC*, 520 F.2d 182 (D.C. Cir. 1975) (ten year delay). *Cf. Wellesley, Concord and Norwood v. FERC*, 829 F.2d 275 (1st Cir. 1987) ("*Wellesley*") (denying petition for mandamus where the Commission had not acted on remand for 14 months).

APPENDIX E

COMPLETE TRANSCRIPT OF THE SEPTEMBER OPEN SESSION OF THE LOUISIANA PUBLIC SERVICE COMMISSION HELD IN BATON ROUGE, LOUISIANA. PRESENT WERE CHAIRMAN JIMMY FIELD, VICE-CHAIRMAN JAY BLOSSMAN, AND COMMISSIONERS IRMA *MUSE DIXON, DALE SITTIG, AND DON OWEN.*

PAGE NUMBER	***EXHIBIT NUMBER***
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2	2
3	2
4	Passed
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6	4
7	5
8	6
9	6
10	7
11	7
12	8
13	9
14	9
15	10

* * *

[75] was seconded by Mr. Commissioner Owen. Do I hear any objection? (NONE VOICED) Hearing none, it's so ordered.

MS. GONZALEZ: Exhibit No. 31 is a discussion and presentation by Stone Pigman on the recent RTO issues being considered at the FERC.

COMMISSIONER DIXON: Oh I see Mr. Fontham is here. Welcome Mr. Fontham, we thought you were stuck in Washington. We were concerned.

MR. MIKE FONTHAM: Thank you Commissioner.

COMMISSIONER OWEN: Fontham, was the clock running the whole time?

VICE-CHAIRMAN BLOSSMAN: The whole time?

MR. FONTHAM: Commissioner the clock shut off –

VICE-CHAIRMAN BLOSSMAN: As soon as you walked in your house.

MR. FONTHAM: The clock shut off, this is true, the clock shut off four hours before I got home.

COMMISSIONER DIXON: Aw, he gave us 4 hours grace.

MR. FONTHAM: Because that's what it would have been if I'd flown home. Being a good boss, Mr. Zimmering has allowed his young associate to present part of this report.

COMMISSIONER DIXON: We hope y'all get that straight.

MR. FONTHAM: So I get to say a few words with regard to this RTO.

COMMISSIONER SITTIG: So y'all splitting the work?

MR. FONTHAM: He's given me a little piece of it, Commissioner.

COMMISSIONER SITTIG: That way y'all split the cost.

[76] **MR. FONTHAM:** We conserve that way. Rather than just unleash me, he's holding me in harness.

COMMISSIONER SITTIG: Okay.

MR. FONTHAM: Commissioner and Commissioners, as you know, I know you all are aware of the other matter that has been going on in Washington D.C. that is of some very significant concern to you all, virtually every State Commission in the southeast and probably throughout the country. And that relates to the transmission organization that it appears may be mandated by the FERC and more or less, crammed down on State Commissions sometime in the near future. Prior to July the 12th, as you know in our area the Southwest Power Pool and Entergy through a voluntary process had been working for years and intensely for many months to try to put together what's known as a Regional Transmission Organization which would be a transmission organization that would allow for more commerce on the transmission lines and some independent running of the system so that marketers would have fair advantages and so on. But only July 12, the FERC in a rather broad and in many people's opinion, somewhat arbitrary action, made a ruling that rather than have smaller voluntary regional organizations that there should be four regions of the country each of which would be dominated by one transmission organization and that all of the industry participants should get together before an ALJ in Washington D.C. in July and August in order to "mediate" a solution that "everybody

would agree to". The first thing that happened, we and the Staff monitored these proceeding. As you know, [77] the Southeast Region Regulatory Commissioners all tried to arrange to have people to attend and see what was going on although the State Commissions had only a very small voice, one – basically one vote out of about 12, if they had chosen to vote, most of them did not because they did not want to be preempted by the process. In any event, the very first thing that was explained to everybody by the ALJ was that the energy SPP was no longer a viable possibility and that matters were going to go in a different direction, they could just forget voting on an energy SPP RTO or in any other way thinking about an energy SPP RTO. At that time the Energy Corporation had filed a case here to try to get a small TRANSCO and energy TRANSCO for their service territory approved which raised very great concerns for the Staff because of the revenue requirement effect on ratepayers which would be a substantial increase. And the reason for that is that you take the utilitie's assets and you move them out of the utility rate base over to a TRANSCO and what now happens is that if there are any revenues related to transmission at the wholesale level, those revenues come back as a credit to retail rates and we – the Commission can take those credits and reduce the rates so that even if the FERC would raise the rate of return to some big high level, some incentive level, all the revenues are going to come back because the owners of the transmission get the revenue. So that is a big protection for the ratepayer and as soon as you move those assets to a TRANSCO, the money goes to the stockholders so you no longer get that credit and it automatically, without a doubt means that most, you know, any increase at the wholesale level over state revenue requirements will be crammed through the

retail rate and there would be [78] no offset. Well that became very much of a problem because it became very clear at the FERC both openly and in private discussions that a TRANSCO structure with a TRANSCO on top, as it was called, would be the preordained result and it turned out to be the result that the Judge has now recommended. We believe that there are very substantial concerns for this Commission related to this. One is that even though there may be some authority left for this Commission after the FERC rules to decide if these assets can be transferred to a TRANSCO there is a possibility that that authority will be taken away by Federal Preemption. And even if it is not taken away by Federal Preemption, there is a very large possibility, and most likely a strategy embodied in this, under which the utilities would be more or less ordered to go one by one pick off State Commissions and get them to go along with this program. And I think there, you know, if a State Commission were standing alone against the tide there might be a significant amount of momentum that would be difficult to resist. Secondly, we are highly concerned about this by fiat a drawing of a big X through the SPP Entergy arrangement. Most of the power that comes to Louisiana, I'm not talking about what somebody might want to sell to make a profit somewhere else, but most of the stuff that comes to Louisiana other than the TVA, comes from the north and the west. And if the – if it were ordered that Louisiana join up with the southeast, that would be great for the sellers but it may be bad for the buyers. And thirdly, by having one huge region which will most likely put in all kinds of new pricing arrangements, that would be ordered by the FERC, there maybe some very significant cost shifts to Louisiana and some very significant increases in the retail [79] rates both from the cost shift and the pricing. So that is our report as

Mr. Zimmering has, as I believe it to be, has disseminated to you. Perhaps we didn't get it to you in the most advanced manner, but we have provided you a report on all of this and we do have a suggestion as to what the Commission might want to consider doing. And the way we got to this suggestion was in consultation with the Staff, particularly with Mr. St.Blanc, with our consultants, as to what possible action a State Commission may want to take. And you know, this is a matter that we believe would be a good idea, it's not a substantive action at this time. But what we would suggest is to order a rule to show cause why the – and require the utilities to come in, Entergy, SWEPCO, CLECO, to demonstrate why this would be in the public interest or why they should not be forbidden from 1) transferring assets to a TRANSCO 2) disbanning the SPP RTO and instead going to the southeast and 3) accepting the pricing and cost transfer requirements that would be embodied in this Mediation Order. And the theory here is simply this, that if the Commission waits for the FERC to act, we will be a tag along Commission, you know, one of 50 people who has a problem, wants a rehearing and it will be of, I think, of rather small consequence to the FERC that the Louisiana Commission has a problem with what the FERC wants to do. Whereas it will be a matter of rather large consequence to the LPSC what would be the appropriate action in the public interest for Louisiana and if somebody wanted to try to stop the LPSC, assuming the LPSC finds it not to be in the public interest, it would happen on Louisiana turf. And you know, we're not for saying that anybody should decide – pre-decide what the results should be, but we do think to have [80] that proceeding going would be a wise choice either at this meeting or your next meeting.

VICE-CHAIRMAN BLOSSMAN: Well I can say one thing, it sure sounds like everything's all FERCed up. And I think we need to do what we need to do and if we need to issue an Order, a rule to show cause to all the utilities, we need to do it.

COMMISSIONER DIXON: Do you need a motion for that?

CHAIRMAN FIELD: Mr. Zimmering do you have any comments?

MR. ZIMMERING: The only comments I have Commissioners are about the increasing rates. Entergy's filing with this Commission indicated 130 percent increase in bulk transmission rates. So we're not talking about a little bitty increase in rates, it's significant. The second thing is the states we're talking about throwing Louisiana in with are North Carolina, South Carolina, Georgia, Alabama, Tennessee, Mississippi, Arkansas, Louisiana, and a non ERCOT portion of Texas and possibly Florida. So you've got East Texas all the way up to North Carolina.

COMMISSIONER DIXON: You have Tennessee with the Tennessee Valley authority.

MR. ZIMMERING: Tennessee Valley authority, I'm sorry. Yes, Tennessee as well, I'm sorry I didn't mean to miss that Commissioner. The third thing that I would just like to expand on just a little bit is that with Louisiana, if most of Louisiana goes east there's a real good chance Louisiana gets split because there's a very good chance SWEPCO will go with the Southwest Power Pool up [81] north and we would lose both the benefits of SWEPCO and the benefits that are available from Public Service of Oklahoma and I think the last thing this Commission wants

to do is to split the State of Louisiana. Finally I think the concerns that you have about local safety and reliability are simply not going to be the kinds of things that an FERC Ordered RTO of this magnitude is going to be interested in because they're not going to make a big profit on some little feeder line that needs help but it sure makes a big difference to the people in the subdivision right down in your district.

COMMISSIONER DIXON: And what about rates?

MR. ZIMMERING: Rate? I think we're talking about 130 percent increase by Entergy's own estimates.

MR. FONTHAM: And that's – 130 percent means you're double and a half because it's not 30 percent, it's 130 percent on top of what's already there. So you know, that's not all due to joining this organization but just the bureaucracy that they've put together is going to be tens or millions of dollars.

COMMISSIONER DIXON: Let me ask you one quick question. Is any of this stuff safe now that we've had what happened to us last Tuesday? Is that something we ought to be considering when you're talking about transferring all of the assets to four different units rather than having things in all the different states?

MR. FONTHAM: Commissioner I don't know that – I personally I'm not an engineer and I don't know enough about the engineering of it to say that there is a big difference. There were very – the people who were in that room, the [82] engineers, they know what they're doing and I don't really think they're trying to do anything unsafe. I do think though that when you get down to the

local concern aspects of things of you know where you put a transmission line or whether you can have the federal government decide where to put it as opposed to the state government deciding where to put it. You transfer the – if you were to transfer the power there and there's Legislation and Congress that might do that, that would be a big difference in traditional police power. And this is part of that movement.

COMMISSIONER DIXON: And you'll have another layer of bureaucracy over us as it relates to that RTO.

MR. FONTHAM: I think your authority will –

COMMISSIONER DIXON: Diminish.

MR. FONTHAM: Most likely disappear virtually if this is done.

CHAIRMAN FIELD: Mr. Fontham, let me see if I understand this right. You suggest we file a rule to show cause on all utilities owning transmission assets in Louisiana?

MR. FONTHAM: Yes.

CHAIRMAN FIELD: Why they – to show why it's in the public interest 1) to transfer the assets to a TRANSCO –

MR. FONTHAM: Commissioner, Mr. Zimmering was kind enough to give me a cheat sheet, if you would like to see what we are suggesting.

CHAIRMAN FIELD: Right. Now where would you file the rule to show cause, in East Baton Rouge Parish?

[83] **MR. FONTHAM:** No it would be with you all.

COMMISSIONER DIXON: Right here.

MR. FONTHAM: You all would issue a rule to show cause for them to come in and show cause why they should not be prohibited from doing this. So that you know, conceivably you'd be in a timing fashion that's not trailing along after the FERC.

VICE-CHAIRMAN BLOSSMAN: Should I read it then? Okay, a motion for a rule to show cause 1) why CLECO, Entergy Gulf States, ELI and SWEPCO should not be enjoined from transferring their bulk transmission assets, paid for by jurisdictional ratepayers, to a TRANSCO or any similar organization 2) why CLECO, EGSI, ELI and SWEPCO should not be enjoined from joining a Southeast Regional Transmission Organization as opposed to an SPP RTO or other regional organization 3) why the Louisiana Public Service Commission should not declare that the pricing and cost transfers required by the FERC Administrative Law Judge recommendation conflict with the public interest?

COMMISSIONER DIXON: Is that your motion?

VICE-CHAIRMAN BLOSSMAN: That's the motion.

COMMISSIONER DIXON: Second.

COMMISSIONER OWEN: Mike, to your knowledge are any other states considering similar action to this?

MR. FONTHAM: The – my understanding Commissioner is that virtually every state in the southeast has filed for rehearing at the FERC. Some states have filed, I believe an appeal asking that it be enjoined or stopped, the mediation [84] proceedings, I do not know exactly whether anybody has done a rule to show cause. There are some state Commissions who have proceeding's pending and they may use those proceedings to try to do something about this. But this is consistent with the, what I understand to be the Southeast Regulatory Commissioners stance that was taken in the letter that was written to the Chairman of the FERC.

COMMISSIONER OWEN: Would this get the FERC's attention?

MR. FONTHAM: Commissioner, that would be the hope. Now whether it will or not – I mean I think this is a train as far as the FERC is concerned that is moving fast and whether they would pay any attention to it or not, I don't know but if the Commission were to issue an Order in conflict with the FERC then there is a conflict and something has got to be done about it.

COMMISSIONER OWEN: I think we ought to do it. I think it would get their attention.

COMMISSIONER DIXON: I think so. Mr. –

COMMISSIONER OWEN: Excuse me just a second. Isn't there a concern Mike, that these are various transmission systems all stuck together won't necessarily work?

MR. FONTHAM: Commissioner, I think that there has been a legitimate concern raised that this very large region, your trying to come up with, – you know, all

of the sudden instead of planning for – like Entergy, might plan its transmission for parts of four states. Well, and you know they do a pretty good job – you know they have people who know what they're doing. But the – you [85] know, if you all of the sudden say, okay we're going to regulate the transmission system on a 13, 14 state basis with all the power flows and everything else, nobody's ever done that before. You know, it's been done in sort of a coordination type of a way, but from the top down deciding how everything flows, that has not been done before. They're dreaming up ways to deal with congestion –

COMMISSIONER OWEN: Well these systems weren't necessarily designed to do what they would now be expecting them to do.

MR. FONTHAM: None of them were.

VICE-CHAIRMAN BLOSSMAN: Well let me – are you finished Commissioner Owen? I just wanted to sneak in here and say one little quick thing that the new Chairman of the FERC is Pat Wood from Texas and George Bush is from Texas and I would hope that a message would get to the President and I know he's got a lot going on right now not to deal with this, but that's going to increase everybody's rates 130 percent across the whole region. And if he likes being President and he lets Pat Wood do something like that, he won't be President in four years. I mean people – this affects their pocket book dramatically every month and if we got to increase rates in our state 130 percent and Mississippi has to do it, and Alabama has to do it, and Georgia has to do it, and Tennessee has to do it, all those state voted for Bush and I'm telling you I hope he's paying attention. I don't know if he's worried about what we're doing here in Baton Rouge

but that's a serious challenge that he's letting Pat Wood do.

MR. FONTHAM: The only state in the nation, well there are two states in the

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Supreme Court, U.S.
FILED
OCT 15 2002
OFFICE OF THE CLERK

(3)

No. 02-299

IN THE

Supreme Court of the United States

ENTERGY LOUISIANA, INC.,

Petitioner,

v.

LOUISIANA PUBLIC SERVICE COMMISSION, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Louisiana

REPLY BRIEF IN SUPPORT OF PETITION

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October 15, 2002

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

15 pp

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REPLY BRIEF IN SUPPORT OF PETITION

The Louisiana Public Service Commission ("LPSC") acknowledges that the Entergy System Agreement is a FERC tariff and that FERC has jurisdiction to decide whether the tariff has been violated and if so, whether the end result is rates that are unjust, unreasonable, discriminatory, or otherwise excessive. The LPSC now asserts, however, that if FERC has not ruled on the precise issue, the LPSC has jurisdiction to "determin[e] whether a party violated [the] tariff" and to grant Louisiana consumers a lower rate in order to "enforc[e] the requirements of federal law." Opp. 8, 1.

The LPSC is wrong. Under the Federal Power Act ("FPA"), FERC has exclusive jurisdiction to establish and enforce tariffs and issue any remedies for their violation. "[I]f FERC has jurisdiction over a subject, the States cannot have jurisdiction over the same subject." *Miss. Power & Light Co.* v. *Miss. ex rel. Moore*, 487 U.S. 354, 377 (1988) ("*MP&L*") (Scalia, J., concurring). State regulation is preempted, whether FERC has ruled or not. *Id.* at 375. The LPSC has no power to decide that a FERC tariff has been violated, that a FERC rate is unjust or unreasonable, or that Louisiana consumers should receive refunds of FERC rates.

In asserting jurisdiction here, the LPSC relies almost exclusively on cases under the Interstate Commerce Act ("ICA") and the Federal Communications Act ("FCA"). These cases are inapposite. They involve distinct statutory language and regulatory regimes that divide authority between the federal and state governments in a different manner to achieve a different purpose. See *infra* at 6-8. The lone FPA case that the LPSC cites holds that the FPA preempts state regulation that would "impose a rate different from the filed rate." *Gulf States Utils. Co.* v. *Alabama Power Co.*, 824 F.2d 1465, 1470 (5th Cir. 1987). That is precisely what the LPSC and the Louisiana courts did here.

The issue presented by the petition is important and recurring. The LPSC is relying on the decision below to justify asserting authority over the prudence of ELI's payment of other FERC-regulated rates. And, because this decision authorizes state regulators to decide whether rates assessed under FERC rate schedules are excessive, it conflicts with *MP&L* and numerous other decisions of this Court. Like the Fifth Circuit decision it follows, see *New Orleans Public Service, Inc.* v. *Council of the City of New Orleans*, 911 F.2d 993 (5th Cir. 1990), *cert. dismissed*, 502 U.S. 954 (1991) ("*NOPSI*"), the decision authorizes States to favor their parochial interests over the integrated, multi-state approach that the FPA established. That the LPSC regards the dollar amount at issue as small is beside the point. What is at stake is FERC's exclusive jurisdiction to determine, enforce, and make remedial determinations with respect to wholesale cost allocations and rates – matters of central importance under the FPA that warrant this Court's intervention.

1. The central, erroneous premise of the LPSC's brief is that state regulators may determine whether a utility has violated a FERC tariff and craft a remedy for such a violation. Opp. 1, 7-8. This contention is utterly inconsistent with the FPA and numerous decisions of this Court.

The Entergy System Agreement, including Schedule MSS-1, is a tariff, filed with and approved by FERC. MSS-1 establishes a formula for allocating the costs of reserves among the Agreement's operating companies. Under Section 10.02 of the Agreement, the Entergy Operating Committee determined that ERS units should be included in those costs and the resulting rates. The LPSC asserts jurisdiction to determine that the Entergy Operating Committee misinterpreted MSS-1 and that the result of the claimed tariff misinterpretation is that ELI was assessed excessive rates.

Sections 205 and 206 of the FPA, however, give FERC exclusive jurisdiction to determine just and reasonable wholesale rates and to grant refunds if rates are found to be

unjust, unreasonable, or discriminatory. 16 U.S.C. §§ 824d, 824e. In addition, the FPA specifically authorizes states and municipalities to participate in FERC proceedings and file complaints with FERC. 16 U.S.C. §§ 824d, 824e, 825e. The LPSC agrees that these provisions give FERC jurisdiction to determine whether the rates under the System Agreement are excessive and further that it could have filed a complaint with FERC. Opp. 18, 21. This Court has repeatedly held that "if FERC has jurisdiction over a subject, the States cannot have jurisdiction over the same subject." *MP&L*, 487 U.S. at 377 (Scalia, J., concurring). The LPSC's concession that FERC has jurisdiction to adjudicate and remedy tariff violations should be the end of the matter.

The LPSC, however, insists that unless and until FERC acts, it too has jurisdiction to decide whether a FERC rate schedule has been violated. That argument is inconsistent with the FPA, which admits of no such exception, and with this Court's decisions, most recently *MP&L*.

As here, the tariff at issue in *MP&L* established a formula that determined a rate. The FERC order allocated to MP&L 33% of the costs of the expensive Grand Gulf nuclear plant, but did not specifically find that all the costs of completing the plant and continuing to operate it were just and reasonable. Mississippi asserted that while it lacked jurisdiction to challenge MP&L's 33% allocation, it could determine if the overall amount of Grand Gulf costs and the resulting rates were excessive, because FERC had not specifically addressed the prudence of the completion and continued operation of the Grand Gulf plant. *Id.* at 368.

This Court expressly rejected "the view that the pre-emptive effect of FERC jurisdiction turn[s] on whether a particular matter was actually determined in the FERC proceedings," saying "[w]e have long rejected this sort of case-by-case analysis of the impact of state regulation upon the national interest' in power regulation cases." *Id.* at 374 (quoting *Nantahala Power & Light Co.* v. *Thornburg*, 476

U.S. 953, 966 (1986) (internal quotations omitted)).[1] It observed that although it did not do so, FERC "easily could have considered" the prudence claims that the State sought to investigate. *Id.* at 375. Thus, the Court held that the State lacked jurisdiction to assess MP&L's prudence and that "the Supremacy Clause compels [Mississippi] to permit MP&L to recover as a reasonable operating expense costs incurred as the result of paying a FERC-determined wholesale rate for a FERC-mandated allocation of power." *Id.* at 373.

Like the Mississippi commission and courts, the LPSC and the Louisiana Supreme Court acknowledge that they lack authority to question the formula for the allocation of costs embodied in MSS-1. They assert, however, that, they can adjudicate the prudence of ELI's "acceptance" of the costs allocated to it under that formula, at least until FERC rules on the question. But, *MP&L* makes plain that this is wrong. The Supremacy Clause compels Louisiana to allow ELI "to recover as a reasonable operating expense costs incurred as the result of" MSS-1, even if FERC has not addressed the prudence of incurring those costs. *Id.* If the State wishes to assert that ELI's acceptance of these underlying costs is imprudent – *e.g.*, because their inclusion both violates the tariff and results in excessive rates – it must complain to FERC.[2] See *id.* at 375 ("[t]he reasonableness of rates and

[1] *See MP&L*, 487 U.S. at 375 ("[t]he question of prudence was not discussed [by FERC or the D.C. Circuit], however, because no party raised the issue, not because it was a matter beyond the scope of FERC's jurisdiction").

[2] Part of respondents' confusion is a failure to recognize that they "can claim no rate as a legal rate that is other than the filed rate, *whether fixed or merely accepted by the Commission*, and not even a court can authorize commerce in the commodity on other terms." *Mont.-Dakota Utils. Co.* v. *Northwestern Pub. Serv. Co.*, 341 U.S. 246, 251 (1951) (emphasis supplied). *See id.* at 251-52 ("the right to a reasonable rate is the right to the rate which the Commission *files or fixes*[;] . . . the courts can assume no right to a different one on the ground that, in its opinion, it is the only or the more reasonable one") (emphasis supplied). MSS-1 is the filed rate that States must accept unless FERC finds it unjust or unreasonable.

agreements *regulated by FERC* may not be collaterally attacked in state or federal courts") (emphasis supplied).[3]

The concurrent jurisdiction that the LPSC advocates is also inconsistent with FERC's remedial discretion under the FPA. Once FERC finds a violation of a tariff, FERC alone may determine the appropriate remedy, for it is the single, neutral forum authorized to assure that the wholesale rates and cost allocations affecting such rates are "just, reasonable, and nondiscriminatory." State regulation would set the stage for inconsistent determinations of the meaning of tariffs and of the rates that should result from the operation of tariffs. Indeed, it would allow a State to determine rates by ordering refunds, thus setting a *lower rate* for its own consumers.[4]

This case provides an excellent illustration. FERC found that prior to August 5, 1997, the Operating Committee violated the System Agreement by including ERS units in cost allocations under MSS-1. Pet. 6. FERC determined that by doing so, the Committee achieved significant benefits and cost savings for the system; that "'the end result was just, reasonable, and not unduly discriminatory;'" and that refunds were thus inappropriate. *Id.* at 7-8 (emphasis omitted). FERC also approved the amendment to the System Agreement authorizing the inclusion of ERS units. *Id.* at 8.

Having failed to persuade FERC that the rates that resulted from the inclusion of ERS units were unjust or unreasonable, the LPSC avoided the federal forum and itself litigated the same issue for a subsequent period that FERC did not address. It then condemned the inclusion of ERS units in MSS-1 rates and refused to allow ELI to pass through its

[3] This does not "give preemptive standing to a *breach* of federal law," Opp. 17; it simply requires FERC to resolve any rate-violation complaint.

[4] *See Duke Power Co.* v. *FERC*, 864 F.2d 823, 829 (D.C. Cir. 1989) ("[b]ecause the enforcement of filed rate schedules is a matter distinctly within the Commission's statutory mandate, [FERC] has an independent regulatory duty to remedy a utility's violation of its filed rate schedule") (citations omitted).

required payments, thus "trapping" the costs and lowering Louisiana citizens' rates. Louisiana's refusal to accept FERC's remedial decision arises from an understandable, though forbidden, protection of its parochial interests at the expense of those of other States. FERC has exclusive jurisdiction to prevent this kind of self-dealing by States.

In sum, concurrent federal-state jurisdiction over violations of filed rates and contracts is inconsistent with the FPA and this Court's decisions. This Court should grant the petition to eliminate the conflict and protect the integrity of FERC's jurisdiction and the federal regulatory structure.

2. In support of its argument that state utility commissions have jurisdiction to determine whether FERC tariffs have been violated and to trap costs incurred under these tariffs, the LPSC cites numerous cases arising under the ICA and the FCA. The argument ignores three critical points.

First, the statutory schemes are radically different. Whereas the FPA provides for enforcement solely by FERC, the ICA and the FCA expressly give courts (but not state utility commisions) jurisdiction to adjudicate certain collection and other actions alleging violations of tariffs. The ICA election-of-remedies provision authorizes an aggrieved party to either "make complaint to the [Interstate Commerce] Commission" or bring suit "under the provisions of this chapter in any district court of the United States of competent jurisdiction." 49 U.S.C. § 9 (1970), *quoted in S. Pac. Transp. Co.* v. *San Antonio, Texas*, 748 F.2d 266, 271 n.11 (5th Cir. 1984). Similarly, under the FCA, "[c]ustomers alleging that a carrier has violated a filed tariff . . . may choose to bring their complaints to the FCC *or* to 'any district court of the United States of competent jurisdiction.'" *Brown* v. *MCI Worldcom Network Servs., Inc.*, 277 F.3d 1166, 1170 (9th Cir. 2002) (quoting 47 U.S.C. § 207).[5]

[5] *See also Consol. Terminal Sys., Inc.* v. *ITT World Communications, Inc.*, 535 F. Supp. 225, 233 (S.D.N.Y. 1982) (referral to FCC is appropriate where case involves tariff's reasonableness or technical interpretation); *Nat'l Communications Ass'n* v. *AT&T Co.*, 46 F.3d 220, 223 (2d Cir. 1995) (same).

Courts have concluded that in limited circumstances, see *infra* at 8, the ICA and the FCA grant them jurisdiction to enforce ICC and FCC tariffs because, otherwise, the filed-rate doctrine "would render meaningless" the election-of-remedies provisions. *Brown*, 277 F.3d at 1172. By contrast, the FPA contains no election-of-remedies provision, and has *never* been held to permit a court to determine in the first instance if a FERC tariff has been violated.

Second, the differences in the remedial provisions reflect the reality that the FPA effects a very different division of regulatory authority between the federal government and the States than do the ICA and the FCA. The FPA mandates exclusive FERC jurisdiction over wholesale rates and state jurisdiction over retail rates, while the ICA and the FCA provide for federal jurisdiction over carriers' interstate services and state jurisdiction over carriers' intrastate services. See 49 U.S.C. § 10501; 47 U.S.C. §§ 151, 152. Whereas the ICA's and the FCA's authorization of collection and other suits in court poses no substantial potential for the assertion of parochial state interests, a provision that allowed a state commission to adjudicate claims under the FPA and to refuse to pass wholesale costs through in retail rates would allow States to favor their own consumers at the expense of those in other States.

This distinction is evident in the ICA and FCC cases the LPSC cites. Opp. 11-14. These tariff-violation cases are collection actions or contract disputes between carriers and customers. None involves a State attempting to favor its own interests or requires a neutral federal forum. Under the FPA, in contrast, FERC's wholesale rate decisions substantially affect the retail rates of different States' consumers.

Third, even under the ICA/FCA standard for assessing whether a court may adjudicate a tariff violation, a court would lack jurisdiction here. In *Great Northern Railway* v. *Merchants Elevator Co.*, 259 U.S. 285 (1922), this Court held that the ICC has primary jurisdiction when the question is whether shipping rates are just and reasonable, when "the enquiry is essentially one of fact and of discretion in technical matters," and when "administrative discretion" is required. *Id.* at 291, 293-94. Judicial deference to the ICC is not required, however, when the issue is "the meaning of words of the tariff which were used in their ordinary sense" and the application of that meaning to "undisputed facts." *Id.* at 294.[6]

Adjudication of this case requires technical, factual determinations and administrative expertise and thus FERC jurisdiction. The question whether ERS units were "available" within the meaning of the FERC tariff is essentially a matter within the technical discretion of FERC, and FERC alone can determine if the end result of a tariff violation is rates that are unjust and discriminatory. The LPSC's reliance on ICA and FCA cases is badly misplaced.

Finally, the one FPA case that the LPSC cites, *Gulf States Utilities Co.*, conflicts with the decision below. The case addressed other claims that are here irrelevant; and it squarely held that the FPA preempts state regulators from "chang[ing] the filed rate" or "impos[ing] a rate different from the filed rate," as the LPSC and lower courts have done here. 824 F.2d at 1474, 1470. By holding the filed rate unlawful and ordering refunds that FERC plainly would not have ordered, the LPSC has simply changed its own consumers' rates.[7]

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[6] To the same effect, *see S. Pac. Transp. Co.*, 748 F.2d at 272; *United States* v. *Garner*, 134 F. Supp. 16, 18 (E.D.N.C. 1955); *Union Pac. R.R.* v. *Structural Steel & Forge Co.*, 344 P.2d 157, 160 (Utah 1959); *Pa. R.R.* v. *Nasshorn*, 116 N.Y.S.2d 365, 365 (N.Y. App. Div. 1952) (per curiam); *Pa. R. R.* v. *Chromcraft Corp.*, 424 S.W.2d 104, 106 (Mo. Ct. App. 1967).

[7] The LPSC incongruously relies on *Gulf States*' separate holding that federal courts have jurisdiction over other claims that did not challenge a FERC rate (*e.g.*, that a utility failed to negotiate in good faith, that a contract was induced by fraud, and that a utility was selling a *nonaffiliated* utility an improper amount of electricity). 824 F.2d at 1471-72.

3. The LPSC admits that it "could file a complaint and seek relief at the FERC," but contends that "imposing this requirement would unduly burden state regulators" because of the "delay" and "expense of filing and litigating a complaint case in Washington, D.C." Opp. 18. The LPSC does not, and cannot, cite any case or principle of law that supports its assertion that the alleged expense and delay of litigating at FERC trumps the preemptive effect of the FPA.[8]

4. The LPSC also argues that the *Pike County* exception to FERC's exclusive jurisdiction applies. *Id.* at 19 (citing *Pike County Light & Power Co.* v. *Pa. Pub. Util. Comm'n*, 465 A.2d 735 (Pa. Commw. Ct. 1983)). The *Pike County* exception allows States to review the prudence of a utility's purchase of power at FERC rates if the utility has "the legal right to refuse to buy that power." *MP&L*, 487 U.S. at 374. Thus, the prudence of a utility's decision to incur costs under FERC rate schedules is subject to state regulation only if the utility can choose whether to obtain the power and incur the costs at issue. Pet. 17, 18, 21 & n.7.

Here, ELI had no choice about whether to incur the costs imposed by MSS-1. That Agreement is a binding FERC rate schedule – *i.e.*, contrary to the LPSC, it is "mandated by FERC" until FERC says otherwise, Opp. 20. As *MP&L* and *Nantahala* make clear, *Pike County* has no application in these circumstances. FERC has exclusive jurisdiction of challenges to arrangements in an integrated power pool.

5. Last, the LPSC argues that the issue presented will not recur and is of small consequence, because only $1 million is involved and because, as Entergy anticipated, all ERS units

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[8] The LPSC suggests that Entergy should have challenged its decision at FERC, Opp. 21; but the filed rate must be enforced until FERC says otherwise. In fact, FERC's exclusive jurisdiction is intended to prevent the duplicative, potentially conflicting litigation that the LPSC suggests.

have returned to active use. It is neither the amount of money nor the particular rate that makes this case important. The critical issue is the preemptive effect of the FPA on state regulation of integrated power systems. Both the decision below and *NOPSI* conflict with decisions of this Court and numerous other federal and state courts. The issue is important and recurring, as evinced by the many cases in which this Court has intervened to preserve the FPA's delineated spheres of federal and state authority. Pet. 13-22.

The need for intervention is bolstered by the fact that the LPSC's success below has already spawned other attempts to subvert FERC's exclusive jurisdiction. In reliance on the decision below, the LPSC is now conducting a proceeding to assess the "prudence" of ELI's bearing costs under other provisions of the System Agreement that the LPSC believes are not just, reasonable, and nondiscriminatory under the FPA. The LPSC did not institute this proceeding to "permit the acquisition of evidence," Opp. 22 – a right it has in FERC proceedings – but because it asserts the authority to order rate reductions if it finds ELI's payments under the FERC tariff to have been imprudent. *Investigation of Retail Issues Related Entergy Sys. Agreement Billings*, No. U-25888, slip op. at 1 (LPSC Jan. 4, 2002). See also Opp. App. E at 21, 22, 27 (instituting another proceeding because of concern that state "authority will be taken away by Federal Preemption").

But the decisive factor is that in this case, the LPSC, emboldened by the Fifth Circuit's *NOPSI* decision, has succumbed to temptation and effectively changed a FERC rate. This Court should act now to prevent this and future infringements on FERC's exclusive jurisdiction by the LPSC and other States.

CONCLUSION

The petition for certiorari should be granted.

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October 15, 2002

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Supreme Court, U.S.
FILED
DEC 23 2002
OFFICE OF THE CLERK

No. 02-299

IN THE SUPREME COURT OF THE UNITED STATES

ENTERGY LOUISIANA, INC., PETITIONER

v.

LOUISIANA PUBLIC SERVICE COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

The question stated in the petition for a writ of certiorari is: "Whether Mississippi Power & Light v. Mississippi ex rel. Moore, 487 U.S. 354 (1988), and Nantahala Power & Light Co. v. Thornburg, 476 U.S. 953 (1986), require a state public utility commission to allow an electric utility member of a multi-state power system to recover, in retail rates, the costs allocated to it by a rate schedule of the Federal Energy Regulatory Commission ('FERC'), or whether the state commission has jurisdiction to decide that it was 'imprudent' for such a utility to incur the costs allocated to it under a FERC rate schedule, thereby 'trapping' such wholesale costs?"

IN THE SUPREME COURT OF THE UNITED STATES

No. 02-229

ENTERGY LOUISIANA, INC., PETITIONER

v.

LOUISIANA PUBLIC SERVICE COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

Petitioner is an electric utility that operates in the State of Louisiana as part of an integrated multi-State system. A tariff filed with the Federal Energy Regulatory Commission (FERC) governs wholesale transactions among utilities in the multi-State system, including the deficiency payments that individual utilities must make when they do not meet specified targets for contributing electric power to the system. The question in this case is whether a state regulatory commission may determine that deficiency payments petitioner made pursuant to the federal tariff were

imprudent and may not be recovered through petitioner's retail rates, despite an earlier finding by FERC that the tariff terms governing the payments are just and reasonable, and despite the absence of a determination by FERC that petitioner violated the terms of the tariff. Because the Louisiana Supreme Court answered that question incorrectly and in conflict with decisions of this Court, and because the issue has considerable importance for federal regulation of multi-State entities in the electric industry, the petition should be granted.

1. Improved transmission technologies have made it possible to transmit electric power at high voltages over long distances, thereby enabling electric utilities to dispatch power economically from diverse generation sources across broad, interconnected transmission networks. Those technological advances have allowed increased integration of electricity markets in the United States. See New York v. FERC, 122 S. Ct. 1012, 1017-1018 (2002).

Multi-State utility systems have played an important role in that integration. Historically, many of the multi-State systems have been owned by holding companies that control the operation of both electric-generation and electric-transmission facilities on an interstate basis. In this case, petitioner Entergy Louisiana, Inc., is one of the operating companies of Entergy Corporation (Entergy), which is a holding company. See Pet. 3-4; Mississippi Power & Light Co. v. Mississippi ex rel. Moore, 487 U.S. 354, 357 (1988). The member operating companies of the Entergy system "plan, construct, and operate their collective electric generating

and transmission facilities as a single, integrated system serving parts of Louisiana, Arkansas, Mississippi, and Texas." Pet. App. 3a.

Recently, however, FERC has encouraged nondiscriminatory operation of electric transmission facilities by independent transmission system operators (ISOs) and regional transmission organizations (RTOs) that do not own electric-generation facilities and do not have any commercial interest in the generation business.[1] FERC's current RTO policy is intended to promote the realization of efficiencies from regional planning, construction, and operation of transmission facilities, while also removing barriers to a competitive wholesale energy market. See 18 C.F.R. 35.34 (RTO rules); Public Utils. Dist. No. 1 v. FERC, 272 F.3d 607, 610-611 (D.C. Cir. 2001). FERC's rules contemplate that RTOs will integrate existing transmission facilities spanning several States and operate them as a single independent, open-access transmission system, subject to FERC regulation. See 18 C.F.R. 35.34(j) and (k).

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[1] See Regional Transmission Orgs., Order No. 2000, 65 Fed. Reg. 810, on reh'g, Order No. 2000-A, 65 Fed. Reg. 12,088 (2000), petitions for review dismissed sub nom. Public Util. Dist. No. 1 v. FERC, 272 F.3d 607 (D.C. Cir. 2001); see also Promoting Wholesale Competition Through Open-Access Non-discriminatory Transmission Services by Pub. Utils., Order No. 888, 61 Fed. Reg. 21,540 (1996) (requiring utilities subject to FERC jurisdiction to provide nondiscriminatory transmission), clarified, 76 F.E.R.C. ¶ 61,009 and 76 F.E.R.C. ¶ 61,347 (1996), on reh'g, Order No. 888-A, 62 Fed. Reg. 12,274, clarified, 79 F.E.R.C. ¶ 61,182, on reh'g, Order No. 888-B, 81 F.E.R.C. ¶ 61,248 (1997), on reh'g, Order No. 888-C, 82 F.E.R.C. ¶ 61,046 (1998), aff'd sub nom. Transmission Access Policy Study Group v. FERC, 225 F.3d 667 (D.C. Cir. 2000), aff'd New York v. FERC, supra.

2.a. The five Entergy operating companies contractually harmonize their different facilities and power requirements through a System Agreement. The System Agreement "provide[s] the contractual basis for the continued planning, construction, and operation of the electric generation, transmission and other facilities of the [Entergy Operating] Companies," and "for equalizing among the Companies any imbalance of costs associated with the construction, ownership and operation of such facilities as are used for the mutual benefit of all the Companies." Pet. App. 88a (quoting System Agreement); see Mississippi Power & Light, 487 U.S. at 360 (System Agreement "designed to ensure that each company contribute[s] proportionately to the total costs of generating power on the system."). The System Agreement is a federal tariff approved by FERC. Pet. App. 4a; see Pet. 4.

Service Schedule MSS-1 of the System Agreement makes each Entergy operating company responsible for providing a portion of the system's overall power-supply capability. Pet. App. 88a. Schedule MSS-1 requires that when a company's contributed share of total system capability falls below its share of total system demand, the company must make deficiency payments to those system members that cure the shortfall. See id. at 4a-5a, 88a-89a. For purposes of those calculations, each company's contributed capability "shall be the sum of available owned or leased generating units, purchases and seasonal or other energy exchange from demonstrated reliable sources." Id. at 89a (emphasis added). The jurisdictional issue in this case arises from a dispute about

whether certain of petitioner's generating facilities were "available" as that term is defined in the System Agreement and used in Schedule MSS-1 to allocate the costs of system power-production.

b. In the mid-1980s, the Entergy system as a whole had excess electric-generation capacity. Rather than keeping excess generation facilities on-line, the operating companies placed them in an extended reserve shutdown (ERS) program. "The ERS program allowed the Operating Companies to save money by * * * reducing operating staff [and] maintenance costs, and deferring the costs of repairing [excess generation] units." Pet. App. 90a; see id. at 163a n.8 (noting ERS program's benefits to retail customers).

A FERC proceeding during the mid-1990s addressed the question whether power-generation facilities in the ERS program could be considered "available" for purposes of Schedule MSS-1, so that their capability would be considered when calculating an operating company's liability for deficiency payments, or eligibility to receive those payments. See Pet. App. 90a. Entergy's policy was to include ERS generation units as "available * * * units" when making capability calculations. That policy allegedly increased petitioner's deficiency-payment obligations. Id. at 91a; see id. at 85a n.1.

On August 5, 1997, FERC issued Order No. 415 to resolve the ERS dispute. Pet. App. 85a-106a. Interpreting the System Agreement, which had been filed as a federal tariff, FERC determined that generation units idled as part of the ERS program

could not be considered "available" under the language of the System Agreement, and thus their capacity should not have been reflected in capability calculations under Schedule MSS-1. Id. at 85a-86a, 100a. FERC, however, exercised its discretion not to order refunds to the operating companies that were adversely affected by that tariff violation. FERC determined that Entergy received no net gain from its inclusion of ERS generation units in Schedule MSS-1 calculations and that inclusion of the generation units benefitted ratepayers by removing a disincentive to participation in the ERS program. FERC further determined that the ERS units at issue were planned and built to serve all the operating companies collectively, and that parties who objected to the inclusion of ERS units in Schedule MSS-1 calculations had not objected to that treatment before FERC commenced its proceeding. Id. at 101a-103a. FERC concluded that "although Entergy acted in a manner inconsistent with Schedule MSS-1, the end result was just, reasonable, and not unduly discriminatory." Id. at 103a.

"[T]o prevent future disputes," FERC approved a negotiated amendment to the System Agreement that "expressly encompass[es] the ERS program" and "allow[s] ERS units [to be considered] in Schedule MSS-1 calculations pursuant to specific factors." Pet. App. 103a-104a. The amendment approved in Order No. 415 allows the inclusion of an ERS generation unit in capability calculations under Schedule MSS-1 if the unit is shut down "with the intent of returning the unit to service at a future date in order to meet Entergy System requirements," and if the unit's status is evidenced in Entergy

corporate minutes and based on a consideration of criteria specified in the amended System Agreement. Id. at 104a (emphasis omitted).

3. In May 1997, shortly before FERC issued Order No. 415, petitioner filed with respondent Louisiana Public Service Commission (LPSC) financial data that the LPSC would use to set petitioner's retail rates for 1997. Pet. 9; Pet. App. 25a. In the ensuing rate proceeding, a dispute arose over whether petitioner should be allowed to include in its recoverable costs those deficiency payments that were made because generation units in the ERS program were deemed to be "available." Pet. App. 27a. The LPSC described the issue as "whether these ERS units are 'available' as defined in * * * the Entergy System Agreement." Ibid.

In a decision issued in November 1998, the LPSC determined that "[t]here exists no FERC Order or other federal regulation that makes it mandatory for [petitioner] to treat ERS units as available after August 5, 1997" (i.e., the date of FERC Order No. 415). Pet. App. 52a. The LPSC further determined that Entergy had not satisfied the requirements for treating units as "available" under the System Agreement as amended by Order No. 415. Id. at 52a-54a. And the LPSC concluded that petitioner's deficiency payments under Schedule MSS-1 "were imprudently incurred" (and thus not recoverable through petitioner's rates) to the extent that they reflected consideration of ERS generation units. Id. at 55a.

The LPSC recognized that its disallowance of petitioner's Schedule MSS-1 payments raised jurisdictional concerns (see Pet. App. 55a-56a), but deemed it critical that "there currently exists no FERC order that has found that the [treatment of ERS units as 'available'] is in compliance with the System Agreement." Id. at 65a. "In the absence of such FERC determination," the LPSC continued, "this Commission can scrutinize the prudence of [Entergy's] decision without violating the supremacy clause insofar as that decision affects retail rates." Ibid. The LPSC further determined that it could "take judicial notice of the FERC-set standard for treating ERS units as available" (i.e., the 1997 amendment to the Service Agreement) and use it "as an additional test for reasonableness and prudence in [its] review of [petitioner's] MSS-1 expenses." Id. at 65a-66a.

The LPSC additionally determined that removing Schedule MSS-1 payments from petitioner's recoverable costs did not conflict with FERC's decision in Order No. 415 not to award refunds. The LPSC again noted that FERC "did not order, prospectively, that [petitioner] and the other sister companies must continue to include ERS units in MSS-1 calculations, or that payments resulting from such continued inclusion are just and reasonable." Pet. App. 67a; see id. at 71a ("[P]etitioner's obligations to make FERC-approved overpayments ceased on August 5, 1997."). The LPSC therefore concluded that requiring petitioner to exclude the disputed Schedule MSS-1 payments from its recoverable expenses in determining retail rates is permissible because the exclusion "does

not make dual compliance impossible" and "would not violate the filed rate doctrine or the supremacy clause." Id. at 69a; see id. at 72a ("[T]h[e] question of whether the continued inclusion of ERS units in MSS-1 calculations complies with the amended [System Agreement] has never been addressed or decided by the FERC, and therefore no FERC order exists, with which this Commission's finding of imprudence could conflict.").

When finding that the inclusion of ERS units in petitioner's Schedule MSS-1 calculations was imprudent, the LPSC acknowledged FERC's determination (Pet. App. 101a-103a) that there are system-wide benefits from that inclusion. See id. at 73a. But the LPSC stated that FERC's findings "apply at the level of the parent company, whereas this Commission is concerned solely with [petitioner] in this proceeding." Ibid. The LPSC also concluded (id. at 74a, 77a) that Entergy failed to make "a well-considered decision" to treat ERS generation units as "available" under the criteria specified in the amended System Agreement. Thus, the LPSC determined that petitioner "acted imprudently in not minimizing its MSS-1 payments after August 5, 1997 when its FERC-set obligations to make those payments ceased" (id. at 75a) and, further, that the LPSC could require petitioner to exclude payments made after August 5, 1997, "without interfering with" Order No. 415. Id. at 76a.

4. The Supreme Court of Louisiana affirmed the LPSC's decision. Pet. App. 1a-21a. The court stated that the LPSC "[wa]s not attempting to regulate interstate wholesale rates," and not challenging either "the validity of the FERC's declination to order

refunds of amounts paid in violation of the System Agreement prior to the [1997] amendment," or petitioner's "decision to participate in the Agreement." Id. at 19a. Consistent with the LPSC's view, moreover, the Louisiana Supreme Court reasoned that "nothing in the federal statutes or case law * * * prohibits the LPSC from assessing the prudence of [petitioner's] actions," and that Order No. 415 did not require petitioner to continue to make payments under Schedule MSS-1 or to include ERS generation units when calculating its payments. Ibid.

Three Justices dissented. Justice Kimball wrote a dissenting opinion, in which she stated that the "LPSC is simply trying to do indirectly what it may not do directly, namely, determine that ELI violated a FERC tariff." Pet. App. 21a (Kimball, J., dissenting).

DISCUSSION

This case presents a fundamental jurisdictional question that implicates the Federal Energy Regulatory Commission's regulation of multi-State electric systems and its program for promoting competition in the electric power industry. The Louisiana Supreme Court has decided that question incorrectly, in violation of the Supremacy Clause, U.S. Const. Art. VI, Cl. 2, and the Federal Power Act (FPA), 16 U.S.C. 791a et seq. Review by this Court is warranted.

I. THE LOUISIANA SUPREME COURT'S HOLDING VIOLATES THE FPA AND THE SUPREMACY CLAUSE

Section 201(b)(1) of the FPA, 16 U.S.C. 824(b)(1), provides in pertinent part that federal regulatory jurisdiction extends "to the

transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce." Both wholesale power sales and electric transmission within a multi-State system occur in interstate commerce and thus are subject to FERC's jurisdiction. The rates and conditions of service for such wholesale sales and transmission must be set forth in a federal tariff, subject to review by FERC under Sections 205 and 206 of the FPA, 16 U.S.C. 824d, 824e.

In holding that the Louisiana Public Service Commission did not intrude on FERC's FPA jurisdiction, the Louisiana Supreme Court reasoned primarily that FERC has never specifically addressed whether petitioner's treatment of ERS generation units under Schedule MSS-1 is prudent or complies with the amended System Agreement. See Pet. App. 19a. The state court's reasoning was incorrect in two respects. First, FERC's exclusive jurisdiction over the interstate transactions in this case does not depend on a specific exercise of that jurisdiction. Second, there has been an exercise of federal jurisdiction over the inclusion of ERS generation facilities for purposes of calculating payments under Schedule MSS-1. FERC has concluded that the Entergy operating companies' inclusion of ERS generation facilities when calculating Schedule MSS-1 deficiency payments, under the terms of the amended System Agreement, is just and reasonable. FERC, moreover, is exclusively empowered to sanction violations of the System Agreement's provisions.

A. The Louisiana Supreme Court's Reliance On The Absence Of A FERC Order Specifically Addressing Petitioner's Deficiency Payments Under The Amended System Agreement Conflicts With This Court's Decisions In Mississippi Power & Light and Nantahala Power & Light

Mississippi Power & Light Co. v. Mississippi ex rel. Moore, 487 U.S. 354 (1988), involved a state "prudence" review of the operations of the same multi-State utility system at issue here. See id. at 366-368. In Mississippi Power & Light, as in this case, a state court concluded that FERC's jurisdiction is limited to "matters actually determined" by FERC, and that a State may make determinations about the prudence of multi-State system operations if "the issue was not presented" in a FERC proceeding. Id. at 368. This Court, however, determined that the state court "erred in adopting the view that the pre-emptive effect of FERC jurisdiction turned on whether a particular matter was actually determined in the FERC proceedings." Id. at 374. The Court noted that the question of prudence in multi-State system operations is within "the scope of FERC's jurisdiction" even if no party has yet raised that issue in a FERC proceeding. Id. at 375. It explained that "[t]here can be no divided authority over interstate commerce" and, "[c]onsequently, a state agency's efforts to regulate commerce must fall when they conflict with or interfere with federal authority over the same activity." Id. at 377 (citations and internal quotation marks omitted).

Mississippi Power & Light reinforces the settled rule that the FPA "draw[s] a bright line easily ascertained, between state and federal jurisdiction." Federal Power Comm'n v. Southern Cal.

Edison Co., 376 U.S. 205, 215 (1964). It would defeat that settled rule -- and violate the Supremacy Clause -- to have the locus of jurisdiction depend on a "case-by-case" analysis (id. at 216) of which regulator was first to address a matter.

The point is highlighted in this case by the LPSC's assessment that Entergy failed to abide by the requirements of the System Agreement, as amended by Order No. 415. See Pet. App. 52a-54a, 64a-66a, 74a, 77a. Determining compliance with FERC tariffs (such as the System Agreement) falls exclusively within FERC's jurisdiction, whether or not FERC actually has made such a determination. If a State (or another party) seeks a determination of compliance with a federal tariff, its recourse is to file a complaint with FERC under Section 206 of the FPA, 16 U.S.C. 824e. The absence of a federal ruling does not give a State jurisdiction to decide an issue that could be presented to FERC. See Mississippi Power & Light, 487 U.S. at 379 (Scalia, J., concurring in the judgment) (failure to seek FERC ruling "does not take the issue out of FERC's jurisdiction and recommit it to the States."). In short, the States must "gi e effect to Congress' desire to give FERC plenary authority" over wholesale sales and transmissions in interstate commerce, and may "not interfere with this authority." Nantahala Power & Light Co. v. Thornburg, 476 U.S. 953, 966 (1986).

B. The LPSC's Order Conflicts With FERC Order No. 415

Schedule MSS-1 is part of a federal tariff under which the costs of integrated interstate facilities are allocated among Entergy's operating companies. To carry out its statutory duty of

ensuring just and reasonable rates and charges within its jurisdiction, see 16 U.S.C. 824d, FERC analyzes such tariffs from a system-wide perspective, rather than "in light of local conditions alone." Mississippi Power & Light, 487 U.S. at 376 (discussing and enforcing FERC's system-wide approach) (internal quotation marks omitted). However, as FERC has explained in the context of an operating company's entry into an intra-system transaction, FERC's examination of system-wide costs and benefits necessarily includes some consideration of the individual operating companies' prudence:

> [W]here, as here, the transaction involves affiliated, jurisdictional utilities, which are members of an integrated, interstate holding company arrangement, performing diverse functions on a coordinated basis, and particularly where differing interpretations are advocated concerning the parties rights and obligations under the basic system agreement, * * * more complex, interrelated questions arise and, whether one characterizes the questions as related to prudence, interpretation, or cost allocation, they are clearly matters most appropriately resolved by this Commission as part of its overriding authority to evaluate and implement all applicable wholesale rate schedules.

AEP Generating Co., 36 F.E.R.C. ¶ 61,226 at 61,550 (1986) (emphasis added) (discussed in Mississippi Power & Light, 487 U.S. at 378-379 (Scalia, J., concurring in the judgment)).

FERC conducted that type of system-wide analysis -- necessarily incorporating consideration of the individual operating companies -- in Order No. 415. FERC determined that including ERS facilities in Schedule MSS-1 calculations provides "considerable system-wide benefits, in the form of enhanced system efficiencies and cost reductions, that ultimately benefit[] ratepayers." Pet.

App. 102a (footnote omitted). The LPSC, affirmed by the Supreme Court of Louisiana, revisited the issue of ratepayer benefits and reached an inconsistent conclusion based on State-specific considerations. As the LPSC made clear, its primary interest was minimizing Entergy's rates in the State of Louisiana, even if that meant higher rates in other States. See id. at 51 ("FERC's conclusions were based on system-wide concerns and not on the effect of the violation on any individual operating company's retail rates."); id. at 51a-52a ("[O]ther sister companies are benefitting from the MSS-1 treatment of ERS units at [petitioner's] expense."). The LPSC's order in this case therefore conflicts directly with FERC's regulatory policy with respect to the individual Entergy operating companies, as well as the Entergy system as a whole.

It does not matter that, as the Louisiana Supreme Court emphasized (Pet. App. 19a), the LPSC disallowed only deficiency payments made after the issuance of Order No. 415. When FERC determined that ERS facilities could be included in MSS-1 calculations after August 5, 1997, under the amended System Agreement (see Pet. App. 103a-105a), it necessarily determined that such inclusion was prospectively just and reasonable. See 16 U.S.C. 824d(a) (any rate that is unjust or unreasonable is unlawful).

C. The LPSC's Order Violates The Filed Rate Doctrine And Unlawfully "Traps" Costs Incurred Under A Federal Tariff

The LPSC's determination that petitioner did not comply with the amended System Agreement (see Pet. App. 74a, 77a) likewise does not support its assertion of jurisdiction over petitioner's Schedule MSS-1 payments. The filed rate doctrine enforces the Supremacy Clause and "holds that interstate power rates filed with FERC or fixed by FERC must be given binding effect by state utility commissions determining intrastate rates." Nantahala Power & Light, 476 U.S. at 962; see id. at 963. The doctrine "is not limited to 'rates' per se," but extends to (among other things) FERC tariff filings or orders that "directly affect[] * * * wholesale rates." Id. at 966-967. In this case, the filed rate doctrine establishes that the payment regime required by the System Agreement, being the equivalent of a wholesale rate structure, is reasonable as a matter of law unless FERC determines otherwise. See Arkansas La. Gas Co. v. Hall, 453 U.S. 571, 581-582 (1981). Moreover, as the Louisiana Supreme Court and LPSC acknowledged (see Pet. App. 14a), only FERC may determine in the first instance whether Entergy or its operating companies have violated the System Agreement. It follows that the LPSC may not find petitioner's payments under Schedule MSS-1 unreasonable without a predicate FERC determination.[2]

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[2] Respondents assert (Br. in Opp. 19) that petitioner's position in this case "would require state officials to accept an illegal charge" until it is disallowed by FERC. That is exactly what the filed rate doctrine provides in this context. As petitioner explains, moreover, the filed rate doctrine must be

The LPSC's decision also unlawfully "traps" petitioner's costs by preventing petitioner from passing-through to its retail customers the payments it makes to purchase FERC-regulated wholesale services under the System Agreement, even if there is no FERC finding of a violation of the Agreement. See Nantahala Power & Light, 476 U.S. at 970-972. Under the LPSC's decision, petitioner may sell Entergy system power to retail customers only at a price that does not reflect the full amount of petitioner's federally tariffed Schedule MSS-1 payments. See Pet. App. 77a-78a. Therefore, petitioner "cannot fully recover its costs of purchasing at the FERC-approved rate if [the LPSC's] order is allowed to stand." 476 U.S. at 970. "Such a 'trapping' of costs is prohibited" by the Supremacy Clause and this Court's cases. Ibid. The prohibition is no less clear if (as respondents assert, see Br. in Opp. 21) the magnitude of the trapping is relatively small.

The LPSC's order finds no support in "the principle" (Br. in Opp. 19) of cases like Pike County Light & Power Co. v. Pennsylvania Public Utility Commission, 465 A.2d 735 (Pa. 1983). The principle for which those cases stand is that when FERC has approved a seller's wholesale rate for power, state regulators generally retain authority to determine whether buyers of the power acted prudently when purchasing the power at the federal rate,

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applied in this case with specific reference to the FPA's "bright line easily ascertained, between state and federal jurisdiction." Southern Cal. Edison Co., 376 U.S. at 215. The decisions under other statutory schemes on which respondents rely therefore are distinguishable. See Pet. Reply Br. 6-7.

instead of seeking to buy less expensive power elsewhere. See Nantahala Power & Light, 476 U.S. at 972 (discussing Pike County). Here, by contrast, the LPSC has faulted petitioner's entry into and compliance with federal tariff terms that govern deficiency payments between the Entergy operating companies. Pike County has no application here because petitioner's compliance with the requirements of a federal tariff is at issue. Cf. 476 U.S. at 972-973 (rejecting state court's reliance on Pike County and finding conflict between state determination that utility's higher-cost power purchases were unreasonable, and FERC determination limiting utility's access to lower-cost power).

II. THE LOUISIANA SUPREME COURT'S DECISION WARRANTS REVIEW BY THIS COURT

The Louisiana Supreme Court's decision permits a State to override a FERC order approving multi-State operations of an electric utility system, based on that State's assessment of local concerns. The decision therefore endangers FERC's ability to perform its assigned responsibility for assuring that federally regulated rates and services are just, reasonable, and not unduly discriminatory. In particular, FERC's ability to regulate traditional multi-State systems such as the Entergy system, and to promote independent open-access transmission on a regional basis, could be impaired if the Louisiana Supreme Court's decision is allowed to stand.

The jurisdictional ruling of the Louisiana Supreme Court implicates much more than petitioner's ability to recover specific

costs in a single year. Holding companies own multi-State systems throughout the country. Moreover, multi-State independent transmission entities currently operate under FERC rules in all areas of the country except the South and the West, and plans for such entities are being developed for those regions as well. Most multi-State entities use some type of federal tariff mechanism to allocate the costs of facilities within FERC's jurisdiction, whether they are generation facilities, as in this case, or transmission facilities, as in the case of ISOs and RTOs. FERC's review of those tariffed allocations is designed to promote system-wide efficiency through regional planning, construction, and operation of the facilities. In the case of ISOs and RTOs, regional planning, construction, and operation are especially critical to provide all transmission customers throughout the independent operator's region nondiscriminatory service at just and reasonable rates.

Under the Louisiana Supreme Court's decision, however, the individual operating companies of a traditional multi-State system, and the members of an ISO or RTO that own the transmission facilities that have been dedicated to independent operation, cannot be sure whether costs allocated by FERC will be trapped by a state commission, which would result in those costs being borne by shareholders or reallocated to customers in other States. Furthermore, because state regulatory commissions have particular concern for retail rates within their own jurisdictions, one State's disallowance of federally authorized cost-recovery could

lead other States to take similar action. FERC is constrained in addressing those problems because it lacks jurisdiction over retail rates for electric energy. See 16 U.S.C. 824(b)(1). The Louisiana Supreme Court's decision therefore is sufficiently important to warrant review by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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DECEMBER 2002

(4)

Supreme Court, U.S.
FILED
JAN 15 2003
OFFICE OF THE CLERK

No. 02-299

In The

Supreme Court of the United States

ENTERGY LOUISIANA, INC.,

Petitioner,

v.

LOUISIANA PUBLIC SERVICE COMMISSION, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Louisiana

SUPPLEMENTAL BRIEF

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ARGUMENT

In arguing that only the Federal Energy Regulatory Commission ("FERC") may decide whether a party has been overcharged under a contract filed with the FERC, the United States at least edges closer than petitioner, Entergy Louisiana, Inc. ("ELI"), to acknowledging that this case involves compliance with a contract filed at the FERC rather than FERC ratemaking. At the same time, the United States advocates that this Court create a new regime of exclusive FERC jurisdiction for electric contract disputes, in which buyers must pay first and sue at the FERC in the hope of someday redressing their grievances. Further, the United States advocates inverting the intent behind the Federal Power Act, to prevent states from deciding straightforward overcharge cases in which holding companies misallocate costs in furtherance of corporate objectives. These arguments conflict with the Court's precedents and provide no valid basis for review of this case.

Although its argument is adorned with cases relating to the exclusive *ratemaking* power of the FERC, the United States concedes that this case is about contract *enforcement*. [U.S. Br. at 11, 12]. Essentially, the United States attempts to extend ratemaking precedents to contract enforcement. Since issues that could have been decided by the FERC in fixing just and reasonable rates are preemptively determined when the FERC sets a rate, the United States argues that the courts and regulatory agencies are barred from deciding all *enforcement* issues that could be decided by the FERC. [U.S. Br. at 10-11]. But the FERC does not have exclusive jurisdiction over contract enforcement.

The United States also contends, without substantive explanation, that this case may affect the FERC's ability to promote regional transmission organizations. Apparently the United States perceives a threat to the FERC's authority from requiring utilities to comply, promptly, with FERC tariffs. But even if this paradoxical threat could arise, the United States does not explain how this case could threaten a scheme of transmission regulation. Thus,

the contention provides no sound reason for granting certiorari.

1. Breach of the System Agreement.

There can be no reasonable dispute that this case involves a facial breach of the System Agreement. The FERC enacted a tariff that required a process – the consideration of specific criteria and the documentation of the reasons for each decision – before a mothballed unit could be considered "available" to meet System needs. Having breached the "clear and unambiguous" terms of its previous tariff without penalty, Entergy proceeded to disregard the terms of its new tariff. [Pet. App. at 124a, 151a-152a (breach of prior tariff)]. Entergy's Operating Committee was supposed to document its intent to return the units to service "at a future date," but had no plan to return any at a specific future date. [Pet. App. 104a; Resp. App. A]. It was supposed to consider "the projected length of time the unit would be in ERS status," but obtained no projection of this length of time. [Pet. App. 104a; Resp. App. A]. It was supposed to consider "the projected cost of maintaining such unit," but considered no projection of that cost. [Pet. App. 104a; Resp. App. A]. It was supposed to consider the "projected cost of returning the unit to service," but obtained only incomplete and outdated information set forth in a bar chart on that point. [Pet. App. 104a; Resp. App. A]. As an administrative law judge found, "[t]he Operating Committee did not even seek the information necessary to reach a well-considered decision." [Pet. App. at 74a].

Both Entergy and the United States avoid addressing the finding of a contractual breach, with good reason. Entergy billed ELI for units in extended reserve shutdown ("ERS") without satisfying the preconditions established by a contract amendment approved by the FERC. This determination is not complex, does not require regulatory expertise, and would be apparent to any customer upon the slightest review of the Operating Committee's minutes. Yet the United States would have this Court hold

that the Federal Power Act was intended to require that this facial overcharge be imposed on retail ratepayers.

2. Alleged preemptive effect of contract violation.

Although it employs language suggesting that Entergy's actions were authorized under the contract amendment, the United States intermittently faces up to the real issue – whether a contract *violation* should be given preemptive effect. [*Compare* U.S. Br. at 10 *with* U.S. Br. at 11, 15 n.2]. The United States argues that "FERC . . . is exclusively empowered to sanction violations of the System Agreement's provisions." [U.S. Br. at 11]. Further, the United States concedes the implications of its position: "Respondents assert (Br. in Opp. 19) that petitioner's position in this case 'would require state officials to accept an illegal charge' until it is disallowed by the FERC. That is exactly what the filed rate doctrine provides in this context. . . . " [*Id.* at 15 n.2].

Accepting this principle would indeed create a "bright line," but it would be inconsistent with the intent of the Federal Power Act. A utility's facial violation of an unambiguous contract would by law receive presumptive correctness and preemptive effect. Aggrieved parties would be required to seek relief only at the FERC, where even the pendency of this case has not provoked the agency to decide the Louisiana Commission's interruptible load complaint, filed nearly eight years ago.

This new, utility-empowering "bright line" would conflict with the purpose of the Federal Power Act. This Court has recognized that the Act was intended to supplement and aid state regulation, not supersede it. *Connecticut Light & Power Co. v. Federal Power Comm'n*, 324 U.S. 515, 526, 530-31, 65 S. Ct. 749, 754, 756 (1945). This Court also has held that the virtually identical Natural Gas Act "had no purpose or effect to cut down state power." On the contrary, "perhaps its primary purpose was to aid in making state regulation effective." *Panhandle Eastern Pipe Line Co. v. Public Service Comm'n of Indiana*, 332 U.S. 507,

517, 68 S. Ct. 190, 195 (1947). The Court has recognized that "[t]he regulation of utilities is one of the most important of the functions traditionally associated with the police powers of the States." *Arkansas Elec. Coop. Corp. v. Arkansas Public Service Comm'n,* 461 U.S. 375, 377, 103 S. Ct. 1905, 1908 (1983). To hold that a state agency cannot determine the consequences of a facial breach of objective contractual requirements would not be consistent with these holdings.

3. Precedents establishing that the filed rate doctrine does not vest exclusive contract enforcement jurisdiction in federal agencies.

The United States has no substantive answer to the precedents establishing that state and federal courts have jurisdiction to enforce the terms of tariffs filed with federal regulatory agencies. Thus, the United States dismisses the decisions as "distinguishable" because they were decided "under other statutory schemes,"-just as ELI claims the "statutory schemes are . . . different." [U.S. Br. at 15 n.2; ELI Reply Br. at 6]. Paradoxically, ELI distinguishes *Great Northern Railway Co. v. Merchants Elevator Co.*, 259 U.S. 285, 42 S. Ct. 477 (1922), a case recognizing *state court* jurisdiction to enforce a tariff filed with the Interstate Commerce Commission, on the theory that the ICA allows parties to enforce contracts in *federal* court. [ELI Reply Br. at 6]. That distinction does not explain the Court's recognition of state court jurisdiction. For its part, the United States offers no "difference" in the statutory schemes, other than a vague reference to a "bright line," that would require a departure here from the precedents. [U.S. Br. at 15 n.2].

Most important, this Court *has decided* the exclusivity issue under the Natural Gas Act, a parallel "statutory scheme" that is virtually identical to the Federal Power Act and empowers the same regulatory agency. In *Pan American Petroleum Corp. v. Superior Court of Del.*, 366 U.S. 656, 81 S. Ct. 1303 (1961), this Court held that a state court may hear a claim that a customer was overcharged under a contract for

the sale of natural gas that was filed with the FERC's predecessor, the Federal Power Commission ("FPC"). In that case, a Kansas agency mandated minimum prices to be paid for gas produced in Kansas, in excess of contract rates filed with the FPC. The state order mandating the minimum prices was overturned in this Court, and the customer sued in state court to recover the excess charges. The gas producers argued that the suit sought to enforce a federal tariff and could only be brought at the FPC, but the Court rejected that argument. The Court held:

> Petitioners contend that to permit the state courts to entertain the suits brought by Cities Service will jeopardize the uniform system of regulation that Congress established through the Natural Gas Act. Apart from other considerations that dispel such fears, it should be remembered that the route to review by this Court is open to parties aggrieved by adverse state-court decisions of federal questions. . . .

Id. at 665, 81 S. Ct. at 1308-09. The Court also made it clear that *Merchants Elevator*, decided under a different statutory scheme, *does apply* to cases enforcing contracts filed with the FERC. *Id.*, 81 S. Ct. at 1309. The Court concluded: "We hold that the state courts of Delaware do have jurisdiction to hear and decide the claims that Cities Services has formulated." *Id.* at 666, 81 S. Ct. at 1309.

As this Court recognized in *Pan American*, the suit presented a contract claim, subject to the jurisdiction of the state court. Since the suit did not seek to alter the terms of the contract, it did not fall within the exclusive jurisdiction of the FPC. *Id.* at 662-63, 81 S. Ct. at 1307. A similar result was reached by the United States Court of Appeals for the Eighth Circuit in *Pan American Petroleum Corp. v. Kansas-Nebraska Natural Gas Co., Inc.*, 297 F.2d 561, 567, *cert. denied*, 370 U.S. 937, 82 S. Ct. 1581 (1962).

In *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 101 S. Ct. 2925 (1981), this Court recognized that the Federal Power Act and the Natural Gas Act are substantially identical and referred to the "established practice of citing

interchangeably decisions interpreting the pertinent sections of the two statutes." *Id.* at 578 n.7, 101 S. Ct. at 2930 n.7. Thus, *Pan American* and other cases interpreting relevant portions of the Natural Gas Act apply here.

Additionally, the major difference between the natural gas and power acts and other statutory schemes cuts against any need for a single enforcement forum. Unlike other schemes, there was no intent to require uniformity of contracts filed with the FERC. *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332, 338-39, 76 S. Ct. 373, 378 (1956). The Interstate Commerce Act was enacted to ensure uniform shipping charges, but the Natural Gas Act and Federal Power Act permit parties to negotiate the terms of contracts. The contracts are binding unless altered after review by the FERC. Thus, enforcement actions have their basis in state contract law, not federal law. *Pan American Petroleum Corp. v. Superior Court of Del.*, 366 U.S. 656, 662-63, 81 S. Ct. 1303, 1307 (1961).

Given that background, not mentioned by the United States, the vague reference to "other statutory schemes" is an incomplete and unavailing distinction.

4. Ratemaking versus contract enforcement.

The United States relies most heavily on an asserted parallel between this case and *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 108 S. Ct. 2428 (1988). The United States asserts that *Mississippi Power* stands for the proposition that the FERC's preemptive power precludes state consideration of prudence issues even when they are not explicitly decided in a FERC proceeding. [U.S. Br. at 11-12.] But that principle applies to issues necessarily implicit in *making the rate*, not to issues that might arise in a contract enforcement action or a prudence case involving a utility's failure to comply with its contract.

In *Mississippi Power*, the Court determined that a state agency could not disallow costs as imprudent that were included in a tariff approved by the FERC, even if the prudence issue was not actually litigated at the FERC. That decision is imminently reasonable, because a determination

that rates are "just and reasonable" necessarily means the costs included in the rate are reasonable. Any claim that the costs are imprudent would have to be raised at the FERC, which has exclusive jurisdiction to alter or approve the rate. But that principle cannot be extended to enforcement of the contract's provisions after the FERC has accepted or approved them. In that situation, any court or agency with jurisdiction may decide the case so long as the doctrine of "primary jurisdiction" does not require deferring to the FERC. The United States makes no claim that the doctrine applies here, where the violation is straightforward.

In *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 101 S. Ct. 2925 (1981), this Court recognized the difference between contract enforcement and ratemaking. In that case, a natural gas seller brought an action in state court to enforce a favored nations clause in a gas sales contract that gave the seller the right to collect the highest gas price paid by the buyer to any supplier. The seller, which had been receiving for years the original negotiated rate that was on file with the FERC, brought suit when it discovered that the buyer had been paying more to another supplier. The Louisiana Supreme Court awarded damages to the seller in the amount of the difference between the FERC-filed rate and the higher rate paid to the alternate supplier. This Court held that the Louisiana Supreme Court was the appropriate authority to interpret the natural gas contract, but that the filed-rate doctrine precluded the state court from awarding damages based on a rate different from that filed with the FERC. *Id.* at 584-85, 101 S. Ct. at 2934. The Court thus affirmed the Louisiana Supreme Court's interpretation of the contract and all other aspects of its ruling except the damage award, to the extent it conflicted with the FERC-filed rate. *Id.*

In holding that the state court has the authority to interpret and enforce the contract, this Court specifically recognized the validity of the principle enunciated in *Pan American Petroleum Corp. v. Superior Court of Del.*, 366 U.S. 656, 81 S. Ct. 1303 (1961). This Court said that *Pan American* stands for the proposition "that a state rather

than a federal court was the proper forum in which a buyer should bring a breach-of-contract action to obtain a refund of charges in *excess* of the filed rate. Permitting that action in no way contravened the filed rate doctrine; in fact, it furthered the doctrine's purpose." *Id.* at 582 n.12, 101 S. Ct. at 2933 n.12 (emphasis in original).

5. Asserted delegation of preemptive power.

In this case, Entergy made a choice not to comply with its own contract for wholesale sales. The choice was not mandated by, and indeed conflicts with, the contract approved by the FERC. The United States would have this Court rule that such utility choices have preemptive effect, subject to correction only by the FERC. This delegation of preemptive power to utilities is not authorized by the Federal Power Act and could hardly be inferred from a statute originally enacted to constrain utility conduct. *See Enron Power Marketing, Inc. v. F.E.R.C.*, 296 F.3d 1148, 1153 (D.C. Cir. 2002) ("Petitioners have offered no support for the proposition that Congress ever has or even could delegate authority to a federal agency which would then be able to essentially redelegate that authority by deferring to a private body associated with the industry which Congress had commissioned it to regulate.")

Although payments and receipts among the Entergy operating companies under the System Agreement cancel each other out from the parent's perspective, the payments and receipts have profit consequences for Entergy when considered in the context of retail rates. If a holding company has a retail "rate freeze" or "stay-out" in one jurisdiction and ongoing, annual cost of service reviews in another, it has a strong incentive to allocate costs to the jurisdiction with ongoing rate reviews. The costs may be recovered in that jurisdiction, while lower costs produce excess profits in the jurisdiction with the rate freeze. *See generally Louisiana Public Serv. Comm'n v. F.E.R.C.*, 174 F.3d 218, 229-30 (D.C. Cir. 1999). Thus, Entergy may have an incentive to manipulate payments under its System

Agreement, and it is not an appropriate delegee of preemptive regulatory power.

6. State agency power.

If courts can decide that natural gas and power contracts were violated, so can state agencies. In this case, the Louisiana Public Service Commission ("LPSC") determined that Entergy violated an unambiguous provision requiring the System to fulfill certain conditions before billing the costs of ERS units to ELI. Because ELI imprudently accepted excess costs that were assessed illegally, the LPSC refused to require retail ratepayers to pay the costs. This decision falls squarely within the LPSC's exclusive power to ensure that retail rates are reasonable. If ELI were interested in uniformity, it would have appealed the contract ruling and sought review in this Court, but it did not. The United States, for its part, offers not a hint of an argument that the contract permitted Entergy's excess assessment. The contract violation thus forms the fact premise under which this case should be decided. And it cannot have been the intent of Congress in enacting the Federal Power Act to require retail ratepayers to pay illegal overcharges up front, only to endure years of litigation seeking redress at the FERC.

7. Inapplicability of "trapping" analysis.

The United States argues that the LPSC's decision illegally "traps" costs in a manner forbidden by the preemption doctrine. [U.S. Br. at 14-17]. But the disallowance of costs for utility imprudence is not the type of "trapping" that offends federal law. Utilities frequently misallocate costs for ratemaking and regulatory agencies often disallow the excess charges. When a utility bears this cost because of its own misconduct, the costs are not "trapped" in an unlawful manner.

The "trapping" analysis of the United States would turn the preemption doctrine inside out. State agencies would be required to give preemptive effect to overcharges

assessed in violation of contracts filed at the FERC. Congress could not have intended that result in enacting the Federal Power Act.

8. Alleged importance of case.

In seeking to transform this small, nonrecurring retail issue into a matter worthy of the Court's consideration, the United States refers vaguely to the FERC's current effort to create giant Regional Transmission Organizations, run by independent operators, to manage the nation's transmission system. [U.S. Br. at 17-18]. But this case does not involve a transmission service, tariff or charge; it involves an unauthorized charge for the costs of mothballed generators that were constructed half a century ago. Moreover, the United States does not explain how its proposed "pay an illegal charge first and join the FERC relief line" rule would promote compliance with regional transmission tariffs.

As independent operators, merchants and utilities enter the new power "market," contract disputes are inevitable. Denying access to the courts to resolve these controversies and requiring the resolution of disputes at the FERC would deny justice through delay and unduly burden the agency. No valid federal purpose would be promoted by enacting this requirement.

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January 10, 2003

No. 02-299

IN THE

Supreme Court of the United States

MAR 3 2003

ENTERGY LOUISIANA, INC.,
Petitioner,

v.

LOUISIANA PUBLIC SERVICE COMMISSION, *et al.*,
Respondents.

On Writ of Certiorari
to the Supreme Court of Louisiana

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March 3, 2003

PETITION FOR CERTIORARI FILED AUGUST 22, 2002
CERTIORARI GRANTED JANUARY 17, 2003

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NOTICE

The following documents have been omitted in the printing of this Joint Appendix. They may be found in the Petitioners' Appendix to the 02-299 Petition For A Writ Of Certiorari at the following pages:

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NINETEENTH JUDICIAL DISTRICT COURT,
PARISH OF EAST BATON ROUGE,
STATE OF LOUISIANA
DIVISION "D"

2001-CA-1725

ENTERGY LOUISIANA, INC.,

Appellant,

v.

LOUISIANA PUBLIC SERVICE COMMISSION, *et al.*,

Appellees.

RELEVANT DOCKET ENTRIES

DATE	NO.	PROCEEDINGS
2/18/99	2	INJUNCTN Remarks: 39 attchs . . . jl
		* * * *
2/18/99	7	MT/STAY
2/18/99	8	AFDVT
2/18/99	9	TRO
		* * * *
6/31/00	13	CASE/SCHED
9/07/00	14	MIN/ENTRY
9/29/00	15	MT
11/16/00	16	MIN/ENTRY
		* * * *
12/26/00	18	BRIEF

DATE	NO.	PROCEEDINGS
12/26/00	19	MEMO
1/18/01	20	MEMO Remarks: 29 attchs . . . j]
1/31/01	21	MIN/ENTRY
3/9/01		OPINION FILED
3/15/01	22	EXT/MIN
3/15/01	24	EXT/MIN
		* * * *
4/09/01	26	MT/S/APP
4/25/01	27	NTC/APPEAL
5/08/01	28	MIN/ENTRY
		* * * *
5/10/01	31	SUPR/COURT
5/29/01	34	MIN/ENTRY
		* * * *
6/12/01	36	FINAL/COST
		* * * *
4/10/02	41	FND/SC/WRT

SUPREME COURT OF THE
STATE OF LOUISIANA

2001-CA-1725

ENTERGY LOUISIANA, INC.,

Appellant,

v.

LOUISIANA PUBLIC SERVICE COMMISSION, *et al.*,

Appellees.

RELEVANT DOCKET ENTRIES*

DATE	PROCEEDINGS
7/13/01	Original Brief on the Merits on Behalf of Appellant Entergy Louisiana, Inc. (nf)
7/13/01	Exhibits (2 vol.) to Original Brief on the Merits on Behalf of Appellant Entergy Louisiana, Inc. (nf)
8/16/01	Reply Brief on Behalf of Appellee, Louisiana Public Service Commission (nf) (dl)
11/30/01	Oral argument
12/12/01	Post-Argument Brief on Behalf of Appellee, Louisiana Public Service Commission (dl)
12/14/01	Post-Argument Reply Brief on Behalf of Appellant, Entergy Louisiana, Inc.
12/14/01	Exhibits to Post-Argument Reply Brief on Behalf of Appellant, Entergy Louisiana, Inc.

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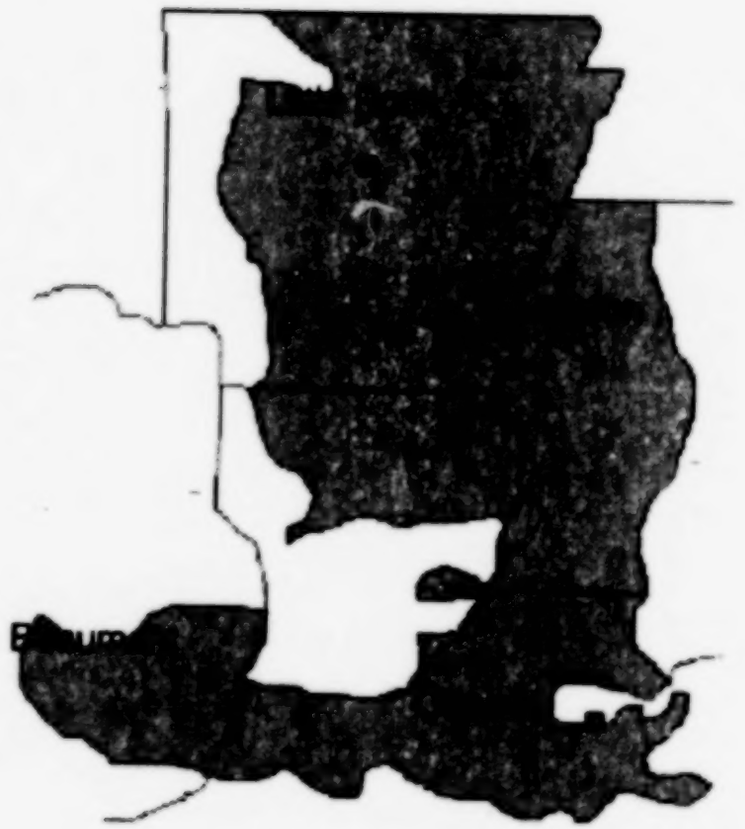
* Compiled from the pleadings on file with the Supreme Court of Louisiana.

DATE	PROCEEDINGS
4/03/02	Opinion filed
4/17/02	Application for Rehearing on Behalf of Appellant, Entergy Louisiana, Inc. (rc)
4/17/02	Exhibits (1 vol.) to Application for Rehearing on Behalf of Appellant, Entergy Louisiana, Inc. (rc)
5/3/02	Opposition of Appellee, The Louisiana Public Service Commission to Application for Rehearing of Entergy Louisiana, Inc. (rc)
5/15/02	Response of Appellant, Entergry Louisiana, Inc. to the Opposition of the Louisiana Public Service Commission to Application for Rehearing
5/15/02	Exhibits (1 vol.) to Response of Appellant, Entergry Louisiana, Inc. to the Opposition of the Louisiana Public Service Commission to Application for Rehearing
5/17/02	Reply of Appellee, The Louisiana Public Service Commission, to Response of Entergry Louisiana, Inc.
5/22/02	Surresponse of Appellant, Entergy Louisiana, Inc. to the Reply of The Louisiana Public Service Commission
5/24/02	Order—Rehearing denied

ENTERGY

System Agreement

Agreement Among:
Arkansas Power & Light Company
Gulf States Utilities Company
Louisiana Power & Light Company
Mississippi Power & Light Company
New Orleans Public Service Inc.
Entergy Services, Inc.



* * * *

ARTICLE I

TERM OF AGREEMENT

1.01 This Agreement shall become effective on August 1, 1982, or such later date as may be fixed by any requisite regulatory approval or acceptance for filing and shall continue in full force and effect until terminated by mutual agreement of the Companies. Notwithstanding this, any Company may terminate its participation in this Agreement by ninety-six (96) months written notice to the other Companies hereto; and effective upon and after the date of implementation of retail open access in Texas, the Texas retail jurisdictional division (as defined in section 2.02) of Entergy Gulf States shall terminate its participation in this Agreement, except as to Service Schedule MSS-2 (Transmission Equalization), consistent with Section 2.02 below.

* * * *

1.03 This Agreement will be reviewed periodically by the Operating Committee to determine whether revisions are necessary to meet changing conditions. In the event that revisions are made by the parties hereto, and after requisite approval or acceptance for filing by the appropriate regulatory authorities, the Operating Committee will thereafter, for the purpose of ready reference to a single document, prepare for distribution to the Companies an amended document reflecting all changes in and additions to this Agreement with notations thereon of the date amended.

ARTICLE II

DEFINITIONS

For the purpose of this Agreement and of the Service schedules which are a part hereof, the following definitions shall apply:

* * * *

2.06 *Operating Committee* shall be the administrative organization created under this Agreement to administer its provisions.

2.07 *Generating Unit* shall be an electric generator, together with its prime mover and all auxiliary and appurtenant devices and equipment designed to be operated as a unit for the production of electric power and energy or as otherwise determined by the Operating Committee.

* * * *

2.14 *Capability* shall be the net output in megawatts that can be produced by a generating unit under conditions specified by the Operating Committee, or the input in megawatts available under contract from a supplying source, including any capacity determined in Sections 2.12 or 2.13 above, plus the contractual amount of firm purchases with reserves available during the month from other systems adjusted upward by the ratio of Seller's Capability and Seller's Load Responsibility as determined in Section 10.02C.

2.15 *System Capability* shall be the arithmetical sum in megawatts of the individual Company Capabilities.

2.16 *Company Load Responsibility* shall be determined as follows:

(a) The average of the sum of the Company's twelve monthly hourly loads coincident with the System's monthly peak hour load for the period ended with the current month measured in megawatts.

Each demand shall represent the simultaneous hourly input from all sources into the system of a Company, less the sum of the simultaneous hourly outputs to the systems of other interconnected utilities.

(b) Less the power supplied to others as sales for the joint account of all Companies.

2.17 *System Load Responsibility* shall be the arithmetical sum in megawatts of the individual Company Load Responsibilities.

2.18 *Responsibility Ratio* of a Company shall be the ratio obtained by dividing the load responsibility of that company by the System Load Responsibility.

2.19 *Capability Responsibility* of a Company shall be the System Capability multiplied by the Responsibility Ratio for that Company.

* * * *

ARTICLE III

OBJECTIVES

3.01 The purpose of this Agreement is to provide the contractual basis for the continued planning, construction, and operation of the electric generation, transmission and other facilities of the Companies in such a manner as to achieve economics consistent with the highest practicable reliability of service, subject to financial considerations, reasonable utilization of natural resources and minimization of the effect on the environment. This Agreement also provides a basis for equalizing among the Companies any imbalance of costs associated with the construction, ownership and operation of such facilities as are used for the mutual benefit of all the Companies.

* * * *

3.08 By jointly planning on a systemwide basis for the construction and operation of these major facilities:

(a) The combined loads of the Companies can be supplied with less aggregate installed capacity; and

(b) Installations of additional capacity can be made at lower cost per kW because of the large unit sizes; and

(c) The new installations will be more economical and require less operating labor and maintenance per kW because of the larger unit sizes; and

(d) The strengthened transmission system will make possible a fuller utilization of the capability of the lower cost generating units of the System; and

(e) Emrgency conditions in any part of the System or other systems in adjacent areas can be met with less probability of impairment of service to the general public.

3.09 It is intended that each Company shall be willing and able to provide its portion of the major facilities determined to be necessary and each Company shall share in the benefits and pay its share of the costs of coordinated operations as agreed upon in accordance with Service Schedules to be attached hereto from time to time and made a part hereof.

ARTICLE IV

OBLIGATIONS

4.01 *Production Facilities*

Each Company shall normally own, or have available to it under contract, such generating capability and other facilities as are necessary to supply all of the requirements of its own customers.

Each Company shall furnish the Operating Committee, at the time and in the manner designated, estimates of its annual peak load for the next succeeding 10-year period, or such period as may be required, together with estimates of its capability available from generating units in operation, under construction or already approved, capability available from

other sources under contract and Qualified Cogeneration Capacity or Qualified Small Power Production Capacity in accordance with Sections 2.12 and 2.13 of this Agreement.

The Operating Committee shall then determine a generation addition plan to provide capacity for the projected system load and furnish reliable service to customers at the lowest cost consistent with sound business practice. Any anticipated large blocks of power sales not previously submitted to the Operating Committee shall be submitted to the Operating Committee as soon as load information is available so that appropriate capacity can be scheduled into the generation addition plan.

Each Company that installs a Generating Unit will make the necessary financial arrangements and promptly proceed with the design and construction of the unit to meet the "in-service" date of the generation addition plan.

Any Capability in excess of the Capability Responsibility of a Company that may exist in the system of one or more Companies as a result of installation of facilities in accordance with the provisions of the generation addition plan shall be equalized among the Companies in accordance with the provisions of the applicable Service Schedule.

* * * *

4.08 *Dispatch*

Under general direction of the Operating Committee, Services will operate a centralized operations center properly equipped and staffed to dispatch the capacity and energy capability of the Companies, in the efficient, economical, and reliable manner as provided in this Agreement. All generating units, included in System Capability under this Agreement, presently in operation or installed in the future, shall be equipped with such controls as may be determined by the Operating Committee to be necessary to accomplish such centralized economic dispatch.

It is recognized by the Companies that, because of such economic dispatch, a Company may not, at all times, be supplying the energy requirements of its system, but may be taking energy from the resources of the other Companies or supplying energy to the other Companies. The payments or charges for such energy exchange shall be as provided in the applicable Service Schedule.

* * * *

4.12 *Service Schedules*

The basis of compensation for the use of facilities and for the capacity and energy provided or supplied by a Company to another Company or Companies under this Agreement shall be in accordance with arrangements agreed upon from time to time among the Companies. Such arrangements shall be in the form of Service Schedules, each of which, when signed by the parties hereto, and approved or accepted for filing by appropriate regulatory authority shall be attached to and become a part of this Agreement.

Each Company reserves the right to unilaterally seek amendments or changes in the terms and conditions of service and increases or decreases in the rates and charges provided in any of the Service Schedules from any regulatory body having or acquiring jurisdiction thereover.

* * * *

4.14 *Billings*

Bills for services rendered hereunder shall be calculated in accordance with applicable Service Schedules, and shall be issued on the fifth working day of the month following that in which such service was rendered and shall be payable on or before the 15th day of such month. After the 20th day, interest shall accrue on any balance due at the rate as determined in Section 35.19a(2)iii of the FERC Regulations, or at such other rate established by the Operating Committee.

* * * *

ARTICLE V

COMPOSITION AND DUTIES OF THE OPERATING COMMITTEE

5.01 *Operating Committee*

An Operating Committee shall be the administrative organization of this Agreement and shall consist of members designated by the chief executive officers of each Company and by the chief executive officer of the Parent Company. Such designation shall be by written notice to the Secretary of the Operating Committee with copies to each of the other Companies. The Companies and the Parent Company may change its designated members at any time by written notice to the Secretary of the Operating Committee and each of the other Companies.

5.02 *Officers of the Operating Committee*

The Operating Committee shall have the following officers with duties as designated:

(a) *Chairman*—The Chairman shall issue calls for and shall preside at meetings of the Operating Committee. He shall have responsibility for the general coordination of the Operating Committee functions among the various members.

(b) *Vice Chairman*—The Vice Chairman shall perform the duties of the Chairman in his absence or incapacity.

(c) *Secretary*—The Secretary shall be responsible for keeping the minutes of the meetings of the Operating Committee and for preparing copies thereof and for distributing them to the Companies. The Secretary shall be responsible for obtaining written approval from the Companies for any acts or decisions of the Operating Committee which may require such written approval, and shall be responsible for distributing copies of such approvals to the Companies.

The Chairman and Vice Chairman shall be elected from the members by majority vote at the first meeting held in each calendar year and shall take office immediately upon being elected.

The Secretary shall be designated by the Operating Committee.

5.03 *Meeting Dates*

The Operating Committee shall hold meetings at least quarterly and at any time upon the request of a member, and shall keep minutes of its proceedings.

5.04 *Decisions*

All decisions of the Operating Committee shall be by a majority vote. For the purposes of voting, the Parent Company shall have twenty (20) percent of the vote and the remaining eighty (80) percent shall be divided among the Companies in proportion to each Company's Responsibility Ratio in effect as of the preceding December 31st.

5.05 *Attendance at Meetings*

Each Company and the Parent Company shall be represented at each Operating Committee meeting by their members on the Committee or a proxy designated by the member or chief executive officer. Such proxy member need not be an employee of the Company represented.

5.06 *Duties*

The Operating Committee shall:

(a) Be responsible for the day-to-day administration of the Agreement and for the filing of this Agreement and any amendments thereto with the Federal Energy Regulatory Commission for approval or acceptance for filing and for distributing copies of such filings to the Companies.

(b) Make the studies required to fulfill the obligations agreed to in the Article IV of this Agreement, and its decisions shall become the basis for the installation of generation, bulk power transmission, communication, and other facilities necessary for the supply of capacity and energy to the System.

(c) Determine the amount of and require installation of adequate reserves of System Capability to assure, insofar as practicable, the continuous supply of capacity and energy to the major load centers of the System.

(d) Establish safe loading criteria for generating units, transmission lines and any other facilities necessary for the supply of power and energy to the major load centers of the System.

(e) Promulgate whatever standards may be required for the safe and reliable operation of the System.

(f) Consult with and provide general supervision for Services in employing and supervising a System Operator and provide for such assistance as needed.

(g) Determine the need for and generally supervise the keeping of records and the making of such reports as are deemed necessary or appropriate.

(h) Determine the need for and generally supervise communications, interchange and automatic generation control, metering, economic dispatch and relaying facilities necessary for the purpose of this Agreement.

(i) Make any determinations required for the purpose of administering any schedules subject to its administration.

(j) Study and determine from time to time additions or changes in facilities necessary to keep abreast of the production and transmission requirements of the System.

(k) Provide for and coordinate safe dispatching, switching and other routine procedures.

(l) Provide for proper distribution of spinning reserves and the supply of reactive kVa.

(m) Establish, amend, supplement or terminate from time to time rules, procedures or practices as necessary to insure functioning of the System within the scope of this Agreement.

(n) Coordinate negotiations with others from time to time for interchange and sale of power and energy.

(o) Coordinate arrangements for the sale and delivery to others on a profitable basis, of power and energy not required for System purposes.

(p) Coordinate arrangements from time to time to procure for the Companies, or for their account, such power and energy from external sources as may be required or will result in savings to the Companies.

(q) Keep abreast of all environmental factors as they affect the operation of the System in order to comply with all established criteria for minimizing pollution.

(r) Undertake any other duties that may from time to time be assigned to it or deemed appropriate.

5.07 *Employment of Consultants*

The Operating Committee, in the performance of its duties, may employ such technical and consulting services as warranted.

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* Typographical correction: "of" changed to "or"

5.08 *Expenses of Committee*

Each Company (except the Parent Company) shall pay the expenses of its representatives on the Operating Committee. The expenses of the representatives of the Parent Company shall be paid by Services. Any other expenses of the Committee shall be prorated among the Companies as determined by the Operating Committee.

* * * *

SERVICE SCHEDULE MSS-1

RESERVE EQUALIZATION

10.01 *Purpose*

The purpose of this Service Schedule is to provide the basis for equalizing the capability and ownership cost incidental to such capability among the Companies in such a manner that the capability and reserves of each Company after equalization shall be equal to its Capability Responsibility.

10.02 *Company Capability*

A Company's Capability shall be determined monthly and shall be the sum of available owned or leased generating units, purchases and seasonal or other energy exchange from demonstrated reliable sources as follows:

(a) The total capability of available generating units owned, operated under Operating Agreements for its own benefit, or leased by such Company, which units shall be included at their demonstrated net output measured in megawatts under conditions established by the Operating Committee. A unit is considered available to the extent the capability can be demonstrated and (1) is under the control of the System Operator, or (2) is down for maintenance or nuclear refueling, or (3) is in extended reserve shutdown (ERS)

with the intent of returning the unit to service at a future date in order to meet Entergy System requirements. The Operating Committee's decision to consider an ERS unit to be available to meet future System requirements shall be evidenced in the minutes of the Operating Committee and shall be based on consideration of current and future resource needs, the projected length of time the unit would be in ERS status, the projected cost of maintaining such unit, and the projected cost of returning the unit to service. A unit is considered unavailable if in the judgement of the Operating Committee it is of insufficient value in supplying system loads because of (1) obsolescence, (2) physical condition, (3) reliability, (4) operating cost, (5) start-up time required, or (6) lack of due-diligence in effecting repairs or nuclear refueling in the event of a scheduled or unscheduled outage.

The generating units of Gulf States that were in extended reserve shutdown on the date of the merger of Entergy and Gulf States, shall not be considered available for the purpose of determining Gulf States' Capability in the Service Schedule MSS-1 Reserve Equalization calculation until the units are brought into service.

If, as part of a settlement or judgment adverse to Gulf States in *Cajun Electric Power Cooperative, Inc. v. Gulf States Utilities Co.*, Civil Action No. 89-474-B (M.D. La.) and/or *Southwest Louisiana Electric Membership Corp. and Dixie Electric Membership Corp. v. Gulf States Utilities Co.*, Civil Action No. 92-2129 (W.D. La.), Gulf States acquires Cajun Electric Power Cooperative, Inc.'s 30 percent share of the River Bend Nuclear Generating Facility (River Bend) (or any portion thereof), then the net output in megawatts associated with such share shall not be considered available for the

purpose of determining Gulf States' Capability in the Service Schedule MSS-1 Reserve Equalization calculation.

(b) The contract quantity of capacity in maegwatts purchased without reserves by the Company.

(c) The contract quantity of firm capacity in megawatts purchased plus an additional amount as developed from the following formula:

$$A = \frac{FP \times SC}{(SL - FP)} - FP$$

where:

A = Amount, in megawatts (mW), to be added to contract quantity of firm capacity purchased.

FP = Amount of firm purchase in mW

SL = Seller's load responsibility in mW, determined by calculating the average of the Seller's monthly hour peak loads for the twelve month period ending with the current month. Each such peak load shall represent the simultaneous hourly input from all sources into the Seller's system, less the sum of the simultaneous hourly outputs to the systems of other interconnected utilities.

SC = Seller's total capability which shall be determined monthly and shall be the sum of the net demonstrated capabilities of Seller's owned or leased generating units and the contract quantity of capacity purchased by Seller, all measured in mW.

(d) That portion of the contract quantity of capacity in megawatts purchased with or without reserves, for the joint account of all the Companies as allocated to the Company on the basis of Section 4.02.

(e) That portion of the contract quantity of capacity in megawatts received under any seasonal or other exchange with outside suppliers for the joint account of all Companies, as allocated to the Company on the basis of its Responsibility Ratio.

(f) Cogeneration or Small Power Production Capacity in accordance with Sections 2.12 and 2.13. The Operating Committee shall have the authority to allocate any such capacity to one or more of the Companies in accordance with FERC Opinion Nos. 246 and 246-A.

10.03 *Basis of Reserve Equalization*

Company Capability in excess of the Capability Responsibility of any Company shall be allocated among the Companies so that the resultant capability and reserves of each Company shall be equal to its Capability Responsibility.

$$ER = CC - SC \times \frac{CLR}{SLR}$$

where:

ER = Equalized Reserve

CC = Company Capability (Section 2.14)

SC = System Capability (Section 2.15)

CLR = Company Load Responsibility (Section 2.16)

SLR = System Load Responsibility (Section 2.17)

If more than one Company has Company Capability in excess of its Capability Responsibility, the excess of each such Company from its Intermediate Generating Units, as defined in Section 2.09 shall be allocated to each deficient Company in the ratio of such Company's deficiency to the sum of the deficiencies of the deficient Companies.

10.04 *Reserve Equalization Payment*

For the reserve allocated in accordance with Section 10.03, the Company or Companies having an excess shall receive, from the Company or Companies having a deficiency, an equalization payment, determined in accordance with the method hereinafter described, for such reserve so allocated each month.

10.05 *Investment in Intermediate Generating Units*

The Investment in Intermediate Generating Units for each Party (based on Federal Energy Regulatory Commission's Uniform System of Accounts Prescribed for Public Utilities and Licensees) shall be limited to gas and oil fired units as follows:

(a) The cost includable for all such units in Accounts 310, 311, 312, 313, 314, 315 and 316.

(b) The cost of step-up transformers, circuit breakers, and switching equipment etc. included in Account 353 and required to connect all such units to the transmission system.

10.06 *Determination of Monthly Billing Charge*

The Monthly Charge (MC) per kW for billings under Reserve Equalization shall be determined for each Company based upon the previous year's operating results. The MC will be based on the average of all units included as Intermediate Generating Units as included in Sections 10.05 (a) and (b).

$$MC = (1/12)\ \frac{RB \times (CM + F) + D + PT + I + FT + OM}{C}$$

where:

CM = the weighted average cost of capital as determined in the following manner:

$CM = (DR \times i) + (PR \times p) + (ER \times c)$

C = The sum of capacity in kW for the generating units in RB

DR = Ratio of Debt Capital at Dec. 31 of the previous year

PR = Ratio of Preferred Stock at Dec. 31 of the previous year

ER = Ratio of Common Stock at Dec. 31 of the previous year

i = Average embedded cost of debt capital outstanding at Dec. 31 of the previous year

p = Average embedded cost of preferred stock outstanding at Dec. 31 of the previous year

c = Return on Common Equity at 11.0%

D = The amount of depreciation for the preceding year as reported on page 429 of the Company FERC Form No. 1 report as related to Intermediate Generating Units and associated equipment required to connect generating equipment to the transmission system.

F = Federal and State Income Taxes determined from the following formulae:

$$F = \frac{T}{(1 - T)} \times (CM - DR \times i)$$

where:

T = f + s - fs when federal tax is not deductible in computing state tax, and

$T = \frac{(f + s - 2fs)}{(1 - fs)}$ when federal tax is deductible in computing state tax, and

f = Federal Income Tax Rate

s = State Income Tax Rate

RB = The amount as of December 31, of the preceding year reflected in Plant Accounts 310, 311, 312, 313, 314, 315 and 316 for gas or oil fired Steam Production Plants, plus an amount included in Account 353 which represents the investment in step-up transformers, circuit breakers, and switching equipment, etc. required to connect all such units to the transmission system, less the accumulated provision for depreciation for the gas or oil fired units in the Steam Production plants and the accumulated provision for depreciation associated with the equipment included in Account 353 described above, and less the proportionate amount of Account 282 Accumulated Deferred Income Taxes.

I = Preceding year insurance premium for Intermediate Generating Units included in RB

PT = Ad Valorem taxes for the preceding year for Intermediate Generating Units Included in RB

FT = Applicable Corporation Franchise Tax for the preceding year for Intermediate Generating Units included in RB

OM = Operation and maintenance expenses plus the applicable general and administrative expenses. These combined expenses will be determined annually by taking the applicable accounts for each Company related to their owned generating capacity, together with the applicable general and administrative expenses, proportioned to the direct labor expenses.

Fossil Fueled Units

Direct—Accounts 500, 502, 503, 504, 505, 506, 507, 510, 511, 512, 513 and 514.

Allocable—Accounts 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931 and 932.

10.07 *Adjustment for Tax Changes*

The Reserve Equalization Payment as determined above shall be adjusted to reflect the imposition of any applicable new taxes not included in the above formula, or for any increase or decrease in taxes included as of the date of this Agreement.

10.08 *Billing Procedure*

The billing parameters will be in effect from June 1 to the succeeding May 31 based on the preceding year's results.

This Service Schedule MSS-1 shall be attached to and become a part of the Agreement dated the 23rd day of April, 1982 and shall be effective with said Agreement or at such later date as may be fixed by any requisite regulatory approval or acceptance for filing.

Attest

Original signed by
R.J. Estrada
Assistant Secretary

ARKANSAS POWER & LIGHT COMPANY

Original signed by
Jerry Maulden
President

Attest

Original signed by
W.H. Talbot
Secretary

LOUISIANA POWER & LIGHT COMPANY

Original signed by
J.M. Wyatt
President

Attest

MISSISSIPPI POWER & LIGHT COMPANY

Original signed by
R.J. Estrada
Assistant Secretary

Attest

Original signed by
William C. Nelson
Secretary

Original signed by
D. C. Lutken
President

NEW ORLEANS PUBLIC SERVICE INC.

Original signed by
James M. Cain
President

* * * *

SERVICE SCHEDULE MSS-3

EXCHANGE OF ELECTRIC ENERGY AMONG THE COMPANIES

30.01 *Purpose*

The purpose of this Service Schedule is to provide the method of pricing energy exchanged among the Companies.

* * * *

RE: LPSC Docket No. U-20925 (1996 and 1997 FRP proceedings)

Dear Counsel:

Pursuant to the conversations among Mike Fontham, Paul Zimmering, Randy Young, John Chavenne, and me, this letter agreement documents the following stipulation by the Louisiana Public Service Commission ("LPSC"), Entergy Louisiana, Inc. ("Entergy Louisiana" or "Company"), the Louisiana Energy Users Group ("LEUG"), and Marathon Oil Company ("Marathon") regarding the resolution of certain issues that have been addressed in Entergy Louisiana's first and second annual Formula Rate Plan proceedings (the "1996 FRP proceeding" and "1997 FRP proceeding," respectively):

1. *Authorized Rate of Return on Common Equity*. The authorized rate of return on common equity approved by the Commission in the 1996 FRP proceeding (10.5%) will be implemented through a prospective adjustment applied as provided in the Formula Rate Plan.

   Further, that same authorized rate of return on common equity will be used in the 1997 FRP proceeding, and as part of this settlement, the Company will not oppose the issuance of a credit, the effect of which would be to apply, effective July 1, 1997, that authorized rate of return on common equity in the calculation of the rate adjustments required by the Formula Rate Plan. The Company agrees to this with a full reservation of its rights in future Formula Rate Plan proceedings, and notwithstanding its position that such retroactive application is not appropriate pursuant to the Formula Rate Plan under the circumstances of this case.

Additionally, that same ROE will be the approved ROE for purposes of the 1998 FRP proceeding and will be reflected in the Company's 1998 FRP filing, if an FRP filing is made by the Company in 1998.

2. *Capital Structure (gross vs. net proceeds of debt).* In consideration of Company's agreement with respect to item 1 above, the Commission agrees that it will not rule on the capital structure issue in the 1996 FRP proceeding, agrees that the record developed in the 1996 FRP proceeding with respect to the capital structure issue will be merged with the record developed in the 1997 FRP proceeding with respect to that same issue, agrees that the testimony and evidence on this same issue developed in the 1997 proceeding will be completed in accordance with the current schedule for the 1997 proceeding, and agrees that the issue will be tried during the February 1998 hearing currently scheduled to commence on February 16, 1998. The Commission's decision on this issue in the 1997 FRP proceeding, based on the record of the hearing conducted in February 1998, will be effective prospectively only from the date of the Commission's order.

3. *Other issues in the 1996 FRP proceeding.* The Commission's decision as it relates to all other issues in the 1996 FRP proceeding will be applied prospectively following the issuance of an order by the Commission in calculating the amount of the resulting rate adjustment to be implemented pursuant to the 1996 FRP proceeding. The correction to the LIPS rate adjustment, however, will be applied retroactively effective July 1, 1996.

4. *MSS-1 Billings.* This stipulation does not address issues relating to MSS-1 billings to the Company under the System Agreement, and shall have no effect

upon the litigation or resolution of such issues in the 1997 FRP proceeding.

5. *Other issues in the 1997 FRP proceeding.* All other issues in the 1997 FRP proceeding will be settled as follows, and except as specifically provided herein below, will be implemented prospectively following the issuance of an order by the Commission approving the terms of this settlement.

   a. *Restructuring costs.* Restructuring costs accrued, but not expended, in the 1996 evaluation period (having a value of $1,553 million) will be removed from the Company's revenue requirement for purposes of adjusting rates pursuant to the Formula Rate Plan. This adjustment will be applied effective July 1, 1997.

   b. *SERI rate increase.* This issue will be resolved in accordance with the provisions of the Proposed SERI Refund Procedure, a copy of which is attached hereto and made a part hereof.

   c. *SFI Period Costs.* Issues relating to the Company's SFI Period Costs will have no effect on the rate adjustments implemented pursuant to the 1997 FRP proceeding.

   d. *Other issues.* No adjustment will be made with respect to any other issues raised in the 1997 FRP proceeding.

Please indicate your agreement with the stipulations set forth above by executing the jurat below, sending a copy to me via facsimile, and returning the signed original to me, retaining a copy for your records. I will distribute a copy of the executed letters to everyone.

The Company is performing the calculations to lower base rates by means of a rider and to provide the credits with

respect to those items that relate to dates past. Assuming that we receive everyone's agreement to this stipulation, we will have bill inserts printed and believe that we can be ready to implement the prospective reductions by late February, with credits appearing on customer bills approximately one month later.

Sincerely,
/s/ Wayne Anderson
J. Wayne Anderson

Agreed and Accepted:
By: /s/ Paul L. Zimmering
Representing: LPSC Staff

OUTLINE

SERI REFUND PROCEDURE FOR ELI

1. For purposes of the 1997 Rider FRP adjustments, any future Rider FRP filings, and any general rate reviews conducted prior to the issuance of a final FERC order in FERC Docket No. ER95-1042-000 ("SERI Case"), the level of Grand Gulf capacity costs reflected in ELI's base rates shall be the level defined by the FERC Administrative Law Judge's initial Decision issued in the SERI Case on July 11, 1996 ("Interim Grand Gulf Cost Level"). Entergy Louisiana shall defer amounts representing the difference between the interim Grand Gulf Cost Level and the level of Grand Gulf capacity costs actually billed to the Company by SERI pending implementation of a final decision by the FERC.

2. The Rider FRP Rate Adjustments shall be revised to reflect the interim Grand Gulf Cost Level on a prospective basis only, subject to refund or surcharge upon the implementation of a final decision by the FERC in the SERI case.

3. The Refund/Surcharge Period shall commence on July 1, 1997, the date on which the full amount of the Grand Gulf capacity costs were reflected in ELI's base rates subject to refund or surcharge pending the implementation of a final decision by the FERC in the SERI case, and shall continue until the date revised Rider FRP Rate Adjustments (or other rates) reflecting the final FERC decision in the SERI Case are implemented ("Final Rates").

ENTERGY SERVICES AND GULF STATE UTILITY COMPANY

Docket No. EL 94-13-000

INITIAL DECISION
(Issued March 3, 1995)

Jacob Leventhal, Presiding Administrative Law Judge

* * * *

Appendix

Offer Of Settlement EL94-13-000

Settlement Provisions

Section 10.02(a) of the System Agreement shall be clarified to explicitly state that a unit that is placed in ERS with the intent of returning the unit to service at a future date in order to meet Entergy System requirements may be considered available for purposes of calculating reserve equalization payments under MSS-1. The amendment is shown below in *bold type and underlined* and is set out in the context of section 10.02(a).The language shown in *italics* is proposed to be added (along with another provision) to this section of the System Agreement by a Compliance Filing submitted to the Commission on December 30, 1993, in the merger proceedings, Docket Nos. EC92-21-000 and ER92-806-000. Section 10.02(a) shall read as follows:

> The total capability of available generating units owned, operated under Operating Agreements for its own benefit, or leased by such Company, which units shall be included at their demonstrated net output measured in megawatts under conditions established by the Operating Committee. A unit is considered

> available to the extent the capability can be demonstrated and (1) is under the control of the System Operator, or (2) is down for maintenance or nuclear refueling, *or (3) is in extended reserve shutdown (ERS) with the intent of returning the unit to service at a future date in order to meet Entergy System requirements. The Operating Committee's decision to consider an ERS unit to be available to meet future System requirements shall be evidenced in the minutes of the Operating Committee and shall be based on consideration of current and future resource needs, the projected length of time the unit would be in ERS status, the projected cost of maintaining such unit, and the projected cost of returning the unit to service.* A unit, *including an* ERS unit, is considered unavailable if in the judgment of the Operating Committee it is of insufficient value in supplying system loads because of (1) obsolescence, (2) physical condition (3) reliability, (4) operating cost, (5) start-up time required, or (6) lack of due-diligence in effecting repairs or nuclear refueling in the event of a scheduled or unscheduled outage. *Notwithstanding the foregoing*, the generating units of Gulf States that were in extended reserve shutdown on the date of the merger of Entergy and Gulf States, shall not be considered available for the purpose of determining Gulf States' Capability in the Service Schedule MSS-1 Reserve Equalization calculation until the units are brought into service.

Minutes

Entergy Operating Committee
September 30, 1997
Attendance: 14

Entergy Arkansas, Inc.	1
** Jim Pilgrim	
Entergy Gulf States, Inc.	1
* Karen Johnson	
Entergy Louisiana, Inc	1
* John Cordaro	
Entergy Mississippi, Inc.	1
* Don Meiners	
Entergy New Orleans, Inc	1
* Dan Packer	
Entergy Services, Inc	9
* Frank Gallaher (Chairman)	
Jim Kenney	
Ken Turner	
Louis Buck	
Jim Rider	
Larry Ables	
Bill Aycock	
Bob Hawkins	
Bob Grenfell	

* Committee members
** Proxy for Drake Keith

MINUTES
ENTERGY OPERATING COMMITTEE
September 30, 1997

Mr. Gallaher convened the meeting at 9:00 a.m.

AGENDA

I.
II. '98 Capacity Plan
III. '98 Load & Capability
IV. Extended Reserve Shutdown Units
V.
VI. Next meeting

ITEM I—

ITEM II—'98 CAPACITY PLAN

Ken Turner briefed the Committee on the status of the '98 Capacity Plan. No recommendation was made regarding the '98 capacity plan since the analysis is not yet complete. (Appendix B)

ITEM III—'98 LOAD & CAPABILITY

Ken Turner presented the '98 Load & Capability Forecast to the committee for approval for planning purposes. (Appendix C)

Motion was made by John Cordaro, seconded by Don Meiners that the '98 Load & Capability Forecast be approved, as presented, for planning purposes. Motion passed.

ITEM IV—EXTENDED RESERVE SHUTDOWN UNITS

Ken Turner discussed the Federal Energy Regulatory Commission's ("FERC") recent order adopting the proposed amendment to Service Schedule MSS-1 intended to address the generating units currently in extended reserve shutdown

("ERS") and the treatment of those units under the System Agreement. The amendment provides, in relevant part, as follows:

> *A unit is considered available to the extent the capability can be demonstrated and (1) is under the control of the System Operator, or (2) is down for maintenance or nuclear refueling, or (3) is in extended reserve shutdown (ERS) with the intent of returning the unit to service at a future date in order to meet Entergy System requirements. The Operating Committee's decision to consider an ERS unit to be available to meet future system requirements shall be evidenced in the minutes of the Operating Committee and shall be based on consideration of current and future resource needs, the projected length of time the unit would be in ERS status, the projected cost of maintaining such unit, and the projected cost of returning the unit to service.*

Based on the information Mr. Turner discussed under agenda items II and III, a motion was made by Don Meiners and seconded by Karen Johnson that the units currently in ERS should continue to be deemed "available" for purposes of determining Company Capability, as that term is defined in Section 10.02 of the System Agreement. Motion passed.

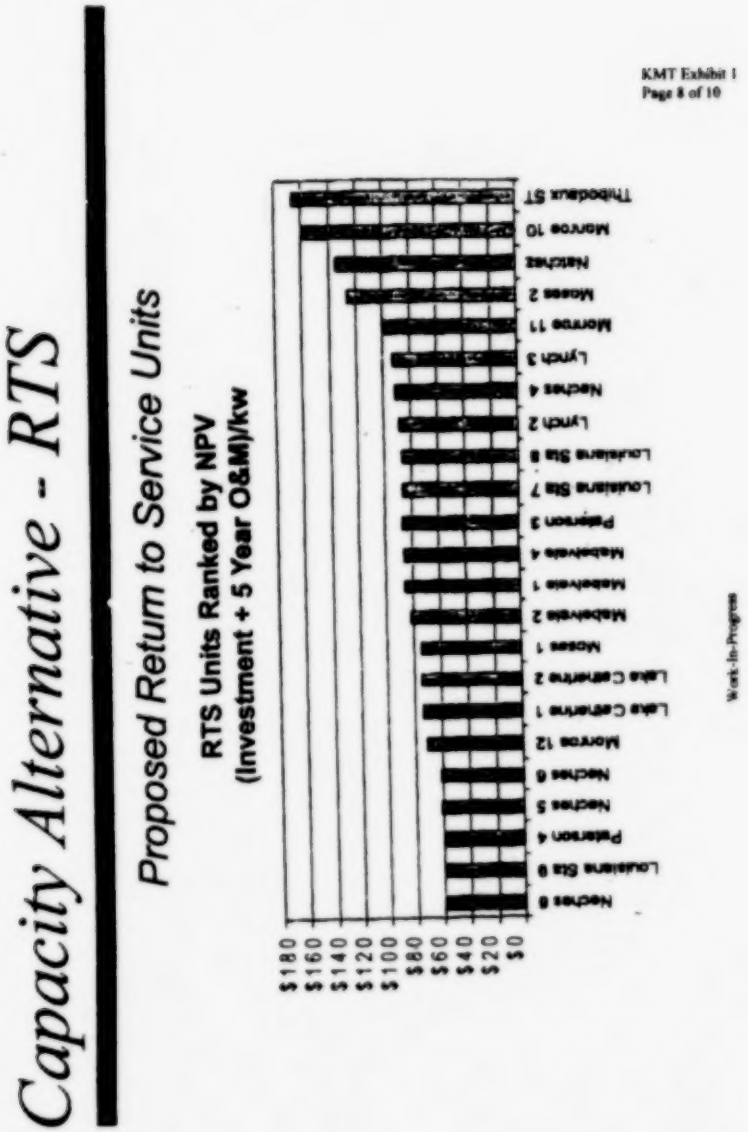
ITEM V

APPENDIX C ENERGY ELECTRIC SYSTEM 1995 LOAD & CAPABILITY FORECAST (MW)

DEMAND-SIDE REQUIREMENTS	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007
1. Native Load Requirements	19,541	19,515	19,787	20,031	20,217	20,366	20,522	20,676	20,859	21,028
2. Demand-Side Resources	(1,249)	(1,140)	(1,144)	(1,147)	(1,144)	(1,108)	(1,041)	(907)	(908)	(909)
3. Firm Native Load (1+2)	18,292	18,375	18,643	18,884	19,073	19,258	19,481	19,769	19,951	20,119
4. Reserve Requirements	2,744	2,756	2,796	2,833	2,861	2,889	2,922	2,965	2,993	3,018
5. Stand-By Capacity Sales	146	174	175	177	201	231	248	276	298	321
6. Capacity Sales W/Op Reserves	220	220	220	160	160	160	160	160	160	160
7. Capacity Sales From Reserves	1,058	1,058	378	350	350	400	400	400	500	500
8. Requirements For Load (3+4+5+6+7)	22,460	22,583	22,212	22,404	22,645	22,938	23,211	23,570	23,901	24,118
SUPPLY-SIDE RESOURCES										
9. Generation Capability	22,730	22,743	22,664	22,678	22,678	22,678	22,678	22,678	22,678	22,678
10. Additions/Retirements/Rerates	13	(79)	14	0	0	0	0	0	0	0
11. Purchases w/o Reserves	492	491	491	491	491	490	533	890	990	990
12. Total Capabilities (9+10+11)	23,235	23,155	23,169	23,169	23,169	23,168	23,211	23,568	23,668	23,668
13. Extended Reserve Shutdown	(1,284)	(1,284)	(1,284)	(1,284)	(1,284)	(1,284)	(1,284)	(1,284)	(1,284)	(1,284)
14. Operational Capability (12+13)	21,951	21,871	21,885	21,885	21,885	21,884	21,927	22,284	22,384	22,384
RESERVE MARGIN										
15. Resource Surplus/Deficit (12-8)	775	572	957	765	524	230	0	(2)	(233)	(450)
16. % Reserve Margin (100*(4+15)/3)	19.2%	18.1%	20.1%	19.1%	17.7%	16.2%	15.0%	15.0%	13.8%	12.8%
17. Operational Surplus\(Deficit) (14-8)	(509)	(712)	(327)	(519)	(760)	(1,054)	(1,284)	(1,286)	(1,517)	(1,734)

NOTES: Line 4. Reflects a 15% target reserve margin. Line 15. Any resource deficit will be supplied in accordance with the System's Integrated Resource Plan. Line 17. Operational deficits will be made up through short-term purchases, return-to-service of units on extended reserve shutdown, or other operational actions.

DATE: 09/26/97 Case No: L09117RO



FORMULA RATE PLAN 1997 ANNUAL FILING ENTERGY LOUISIANA, INC. (FORMERLY LOUISIANA POWER & LIGHT) EX PARTE IN RE: INVESTIGATION OF LOUISIANA POWER & LIGHT COMPANY'S RATES, CHARGES, SERVICES RENDERED AND OPERATIONS & (FORMULA RATE PLAN)

DOCKET NUMBER U-20925

(Hearing held February 16, 1998 before ALJ Carolyn DeVitis)

WITNESS

Matthew Kahal

* * * *

[70] but that's the route he chose to go.

MR. ANDERSON: Well, the other problem, You Honor, is that my copy had writing a over it, and I needed a clean copy. And, frankly, at the time that I made the request, I didn't realize that I was only addressing the authenticity problem, but it certainly would've been easier If I had known.

MR ZIMMERING: Okay. I have no objection to any of those four exhibits, Your Honor.

JUDGE DEVITIS: I am assuming, Mr. Anderson, that you will demonstrate that these items are, in fact, relevant to what we're discussing today?

MR. ANDERSON: Yes, Your Honor.

JUDGE DEVITIS: All right. Please proceed.

MR. ANDERSON: All right. Thank you, Your Honor.

CROSS-EXAMINATION BY MR ANDERSON:

MR ANDERSON: Good afternoon, Mr. Catlin.

MR. CATLIN: Good afternoon.

Q. I'm afraid I've eaten substantially into the 30 minutes I estimated for the time to cross-examine you, but I'll try to be brief. If I refer to the generating units of the Entergy system

that are in extended reserve shutdown as ERS units, can we agree that we're talking about the extended reserve shutdown units?

A. Certainly.

Q. Thank you. Are you familiar with a service schedule to the Entergy system agreement known as, Service Schedule MSS-1?

A. Yes.

[71] Q. Am I correct that billings under Service Schedule MSS-1 might be one number if the ERS units are included in the calculation and a different number if the ERS units are not included in the calculation?

A. Yes.

Q. Okay. Am I correct that the gravamen of the LPSC's complaint to the FERC, which is—has been marked for identification as ELI Exhibit 10, the gravamen of that complaint was that for purposes of calculating the MSS-1 billings, the ERS units should be excluded from the calculation?

A. Yes.

Q. Am I correct that in addition to asking the FERC to rule that the ERS units should be excluded, the Louisiana Public Service Commission also, in that case, requested the FERC to order that refunds be made to ELI so that the ELI ratepayers could be made whole?

A. I think that's generally correct.

Q. And, in fact, that allegation appears on page seven of the complaint in paragraphs numbers 16 and, certainly, the first sentence of paragraph 17, correct?

A. Yes.

Q. Would you read the first sentence of paragraph 17 for me—read it into the record.

A. "Only by ordering the full refund as a remedy can the ratepayers of LP&L and MP&L be made whole."

Q. Thank you. Now, am I correct, Mr. Catlin, that the MSS-1 billings to ELI represent the price that ELI pays for reserve equalization?

[72] A. It's certainly one of the prices, yes, One of the costs.

Q. Okay. It is a price that ELI pays for reserve equalization; would you agree with that?

A. Yes.

Q. Okay. Now, am I correct that Service Schedule MSS-1 is an FERC jurisdictional rate schedule?

A. Yes.

Q. Am I correct that currently the price that ELI pays pursuant to that FERC jurisdictional rate schedule gets included in ELI'S cost of service for retail ratemaking purposes?

A. Yes.

Q. Am I correct that the LPSC complaint, which is ELI Exhibit 10, asks the FERC to order refunds which would have had the effect of lowering the price that ELI paid pursuant to MSS-1 for the periods in question?

A. That would've been the effect, yes.

Q. Okay. Am I also correct that the FERC determined in Order—in Opinion Number 415, that it would not change the price that ELI paid pursuant to MSS-1 for the periods in question?

A. It—it, being the FERC, elected not to order refunds to remedy the tariff violation, that's correct,

Q. Okay. Thank you. And that means that the FERC chose not to change the price that ELI paid pursuant to MSS-1 for the period in question correct?

A. It dented not to change the amount that had been billed.

[73] Q. Okay. And the amount that was billed was the price that was being paid by ELI, right?

A. I would say it was the cost, not the price. When I think of price, I think of a unit—a cost per unit, and I think of when you apply a price to a number of units to get a cost. I would say that it was the cost, not the price.

Q. Okay. If—assume for the sake of my question that the

calculation for MSS-1 for the month of January 1996 was $1 million. Are you with me?
A. Yes.
Q. Thank you. Was that the price that ELI paid that month in connection with the reserve equalization calculation under MSS-1?
A. I would say it was the cost or the amount that it was billed. You've identified that as being $1 million. I would refer to that as a cost.
Q. And not a price?
A. Yes.
Q. In the context of the question, what's the difference between cost and price?
A. Well, I think—as I explained before, I think price—I think of price as a per unit cost, and I think of cost as being the bottom line number of dollars that must be paid when you apply that price to the number of units. I would not use price in this context simply because I don't think it's a price. I think it's a cost, but if you want to define price some different way, I guess you could do that.
Q. Well, let me ask it this way: Would the $1 million in my hypothetical example that ELI paid in January of 1996 be the tariffed rate that ELI was required to pay?
A. The tariff defines the amount that it's paid as an equalization payment based on [74] the various capabilities and load responsibilities of the companies.
Q. And the amount that's paid pursuant to that tariff changes monthly usually; does it not?
A. I haven't looked at whether it's usual that it changes or not. I know that it changes from time to time as the various factors that affect the billings change.
Q. Okay. And the amount that ELI is required to pay pursuant to that tariff, MSS-1, in your lexicon is called what? What would you define that amount as?
A. As the monthly charge or the equalization payment.
Q. Okay. Let's call it the monthly charge. If I refer to that as

the MSS-1 monthly charge, we'll be talking about the same thing, correct? The amount that ELI has to pay in a given month pursuant to the tariff?
A. Sure, we can define it that way.
Q. Okay. Just for the sake of this cross-examination. Is that all right?
A. Sure.
Q. Monthly charge, fair enough?
A. Okay.
Q. The LPSC complaint sought refunds in order that the amount of the monthly charge for prior periods would go down, right?
A. Yes.
Q. And the FERC decided in Opinion Number 415 that it would not amend the amount of the monthly charge for prior periods, right?
A. That's generally correct, yes.
Q. And your testimony proposes that the amount of the monthly charge for prior [75] periods be treated as if they went down, right?
A. Yes.
Q. So, your proposal is that the Louisiana Commission, in setting rates, use a monthly charge other than the charge the FERC has approved for the periods that included January through December of 1996, right?
A. Yes.
Q. You also allege in your testimony, specifically referring to your surrebuttal testimony of January 1988 (SIC) at page four, lines 6 through 8, that there has been no demonstration why the Louisiana ratepayers should pay a monthly charge that includes the amounts actually charged to ELI during 1996, right?
A. Well, what it says is that, recognizing that there was a violation of the tariff, there has been no demonstration why Louisiana ratepayers should pay the excess charges associated with those violations.

Q. Okay. And those excess charges include amounts that were in the monthly charge for the months January through December of 1996, right?
A. Yes.
Q. That's what you mean by excess?
A. Amounts that wouldn't have been there had the—what I'm referring to by excess means amounts that would not have been there had there not been a tariff violation.
Q. And when the FERC looked at this issue, it concluded that the full amount of the monthly charge was appropriate and should be included in the monthly charge to ELI, correct?
[76] A. Well, what FERC concluded was that it wasn't going to order refunds. I'm not sure if your interpretation of exactly what FERC meant when it decided not to order refunds is complete or not, but it did decide that it would not order refunds and change the amount that had been charged to, during this time period, LP&L.
Q. Do you know if the FERC concluded that the amount of the monthly charge that had actually been imposed produced an end result that was reasonable, just and not unduly discriminatory?
A. If you're referencing the—I don't recall the exact words of the order. If you're referencing a particular page of the Opinion 415 or 415-A, the two orders that you put into the record, I could refer to if, but—
Q. I was just asking you if you recalled.
A. I don't recall the specific words, no.
Q. Are you familiar with the concept or term sometimes used in ratemaking called, "trapping of costs"?
A. I've heard it used.
Q. What is your understanding of that term?
A. I think it generally refers to when costs are billed to a utility, but not allowed to be recovered.
Q. I'm going to ask you to picture in your mind's eye a—no, let me not do that. Your Honor, may I approach this board over here?

JUDGE DEVITIS: Yes.
MR ANDERSON: I'll try to speak loud. Am I being picked up? I'm mechanically impaired, I'm sorry to say, Mr. Catlin. I would like you to picture in [77] your mind's eye, for the sake of my question, a pool of costs that I'll represent by this circle, and I want you to assume that these costs are divided by the FERC among four companies, four operating companies like that (INDICATING.) Are you with me?
MR. CATLIN: Yes.
Q. And I'll label these costs and the companies to which they're associated as one, two, three and four, for the four segments. Are you with me?
A. Yes.
Q. I don't know how loud I have to speak. Okay. Now, assume for me that the FERC divides this pool of costs in exactly the fashion shown on this demonstrative, okay?
A. Okay.
Q. And assume that the retail regulators also get a chance to decide how the costs are divided, and one or more them decide that—well, for example, the retail regulator for company one decides that it should only get this amount of cost as shown by the piece of the pie from the horizontal—no, the vertical line, thank you, over to the dashed line. Are you with me?
A. Yes.
Q. And if you assume that retail regulators two, three and four decide respectively for their operating companies that the FERC's division of cost is correct. This portion in here that I'm marking with the poche'd line would be trapped within the meaning of the term "trapped costs," correct?
A. Yes.
[78] Q. Now, when the Louisiana Commission went to the FERC with its complaint regarding the ERS units, there was a division of costs, and I want you just to assume for the sake of my question that the division is represented by one, two,

three and four even though the division of costs may not have been equal as among the four companies, okay?

A. Okay.

Q. When the Louisiana Commission filed its complaint and sought refunds, am I correct that if company number one was ELI and company number two was EMI, the Louisiana Commission and the Mississippi Commission alleged that they paid too much or did not receive enough and that the other companies, Entergy Arkansas and Entergy New Orleans, were the beneficiaries of the fact that companies one and two either paid too much or did not receive enough; is that correct?

A. Yes.

Q. And the Louisiana Commission proposed, did it not, that money would flow from the beneficiaries to the companies that had been deprived or that had been charged too much or not paid enough so that the pie would be divided equally or correctly; is that correct?

A. Yes.

Q. And so the Louisiana Commission proposed at the FERC a fix, a remedy, a solution, if you will, that did not trap any costs; isn't that correct?

A. Yes, I believe that's correct.

Q. Okay. Now, the FERC chose to not order any refunds to flow in connection [79] with the Louisiana Commission's complaint; is that correct?

A. That's correct.

Q. And you are proposing in this case that the Louisiana Commission set ELI's retail rates as if refunds had flowed; is that correct?

A. Yes.

Q. And that would have the effect of reducing the costs represented by MSS-1 and reflected in ELI'S retail rates; is that correct?

A. That's correct.

Q. Now, does the Louisiana Commission have the authority

to command the other operating companies to contribute to this solution?

MR. ZIMMERING: I'll have to object on the basis that calls for a legal conclusion as to whether the Louisiana Commission has that authority.

MR. ANDERSON: Fair enough, Your Honor. I apologize.

JUDGE DEVITIS: I would sustain that.

MR. ANDERSON: Let me re-ask the question. Do you have any understanding, Mr. Catlin, as to whether the Louisiana Commission can order the other operating companies to contribute to this solution in the same fashion in which the FERC had the authority to do so?

MR. CATLIN: I think that that's a legal issue. I would generally not think that they would, but—

Q. Assume for the sake of my question that the Louisiana Commission was without the authority to command operating companies in other states to contribute to this solution at the retail level in Louisiana, okay? Are you with me?

[80] A. Yes.

Q. In that event, this segment of cost that represented the difference between the amount that the FERC had approved in Order Opinion Number 415 and the lower level of costs that you've proposed in this case, that difference would be trapped, would it not?

A. Yes.

MR ANDERSON: Your Honor, in order that the record is clear in this, I would like to make an 8½ by 11 inch representation of these two demonstratives and mark them for identification as ELI Exhibit Number 12 being the one on which I've drawn the arrows and identified the operating companies. And ELI Exhibit Number 13 as the one with the poche'd area and ask that they be received into evidence so that the record, with respect to the witness' answers, will be complete.

MR. ZIMMERING: For purposes of demonstrative exhibits solely, I have no objection.

MR. ANDERSON: Yes, and it's understood, Your Honor. It's only offered as a demonstrative. We don't offer it for any other reason.

MR. ZIMMERING: Okay.

JUDGE DEVITIS: Okay. We'll accept into the record then as demonstrative exhibits, Exhibit 13 which is the circular drawing of four operating companies with the arrows and ELI Number 13, the circular drawing with the pie shaped slice shaded.

MR. ANDERSON: Okay. Your Honor, I may have misheard, but I think you referred to 13 twice. And I may have just misheard, but is it my understanding that

* * * *

[84] should be ordered." Do you see that sentence?
A. Yes.
Q. Am I correct that in that sentence the Louisiana Public Service Commission is alleging at the time that it filed this pleading on September 3, 1997, that refunds should be made, not just beginning in '87 and extending through '93, but beginning in '87 and extending right up until the time refunds are actually made, which would be sometime after September 3, 1997, including refunds for the 1996 period?
A. That's what this indicates.

* * * *

FORMULA RATE PLAN 1997 ANNUAL FILING
ENTERGY LOUISIANA, INC. (FORMERLY LOUISIANA POWER & LIGHT) EX PARTE. IN RE: INVESTIGATION OF LOUISIANA POWER & LIGHT COMPANY'S RATES, CHARGES, SERVICES RENDERED AND OPERATIONS. (FORMULA RATE PLAN)

DOCKET NUMBER U-20925

(Hearing held February 16, 1998 before
ALJ Carolyn DeVitis)

WITNESS

Kenneth Turner

* * * *

[85] MR ZIMMERING: Your Honor, could we take about a two minute break to see if we could talk the company into whether they might consider altering their order of witness and, if they won't, that'll be okay too.

MR. ANDERSON: Sure

JUDGE DEVITIS: We'll take a short break.

(OFF RECORD)

(BACK ON THE RECORD)

JUDGE DEVITIS: We'll go back on the record then.

MR. KENNETH TURNER came forth as a witness and, after having been duly sworn, testified as follows:

JUDGE DEVITIS: Mr. Anderson.

DIRECT EXAMINATION BY MR ANDERSON:

MR ANDERSON: Thank you. Please state your full name and business address for the record.

MR KENNETH TURNER: Kenneth M. Turner, 10055 Grogan's Mill Road, The Woodland's, Texas 77380.

Q. Are you the same Kenneth Turner who filed rebuttal testimony on behalf of Entergy Louisiana in these proceedings under date of December 30, 1997?

A. Yes.

Q. Have you any corrections or alterations to that testimony at this time?

A. No.

Q. Were there rebuttal exhibits that accompanied your rebuttal testimony?

A. Yes.

[86] Q. Am I correct that included among the rebuttal exhibits is information that is deemed by the company to be highly sensitive?

A. Yes

Q. With highly sensitive within the meaning of the confidentiality agreement executed by the Commission staff, the LEUG and the Company in this proceeding?

A. That's correct.

MR. ANDERSON: Your Honor, in connection with the witness' testimony, I would like to mark for identification the rebuttal testimony of Mr. Turner dated—the rebuttal testimony dated December 30, 1997 of Mr. Turner. That testimony is accompanied by exhibits and, particularly, KMT Exhibit 1, page 8 of 10, is highly sensitive. I don't quite how you would like to address this problem, but I would like to mark the testimony and exhibits as ELI Exhibit 14 and ask that it be received into evidence with at least page 8 of 10 received under seal.

MR. ZIMMERING: Your Honor, I understand—whether I agree or not, I understand that the company believes that some of this information is confidential. As long as you can be privy to it and use it for purposes of making your decision and the Commission can do that as well, sealing a portion of the record when we get to examination of the witness on that exhibit is fine.

MR. ANDERSON: And that's fine with us, Your Honor. We don't mean to imply that you don't have full access to it. We would respectfully request that if, in writing your recommendation, you could avoid putting the precise number down, that might be very helpful to us and would obviate the problem. But I merely wanted to raise, as a matter, that the company is concerned about such [87] data, because we are lurching in fits and starts toward a competitive environment and it may be that these data would be commercially sensitive data. But we certainly don't mean that you don't get to look at them and crunch the numbers and do whatever you want.

JUDGE DEVITIS: Okay. So, I believe then what would be proper would be for you to file a redacted version that would be part of the public record and that the rest of it would be filed under seal.

MR. ANDERSON: We'll do that, Your Honor.

JUDGE DEVITIS: I can't really give any final assurances about what I might need to say, but if you would be careful to include in your post-hearing memo your reasons for keeping—

MR. ANDERSON: We'll do that, Your Honor.

JUDGE DEVITIS: —the information private, I would appreciate that.

MR. ANDERSON: Your Honor, I have—low and behold, I've redacted a copy and I can mark it right now for identification as ELI Exhibit 14 and tender it to the court reporter so that I will have at least fulfilled that part of my obligation and then we'll submit a whole copy appropriately marked, under seal, this afternoon or tomorrow morning.

JUDGE DEVITIS: All right.

MR. ANDERSON: And, with that, we make the offer and—that is, we offer it into evidence, and I will tender the witness.

JUDGE DEVITIS: Mr. Zimmering, have you any objections to the redacted version being accepted as ELI Number 14?

[88] MR. ZIMMERING: No, and I was particularly impressed with the procedure used to redact that version of the testimony.

MR. ANDERSON: Listen, don't try this at home, Your Honor. I'm a professional.

JUDGE DEVITIS: Okay. So, we'll accept into the record as ELI Number 14 the redacted version of Mr. Turner' s rebuttal testimony, and I believe the witness has been tendered. Mr. Zimmering.

MR. ZIMMERING: Thank you very much, Your Honor.

CROSS-EXAMINATION BY MR ZIMMERING

MR. ZIMMERING: Well, my notes say, good morning, Mr. Turner. Good afternoon, Mr. Turner. How are you today?

MR. TURNER: Just fine.

Q. As you know, my name is Paul Zimmering. I'm with the Stone, Pigman law firm, and we're special counsel to the Commission in this matter, and I have several questions regarding the extended reserve shutdown units. We'll sometimes refer to them as ERS units. That'll be okay?

A. Yes.

Q. Okay. Now, is it a fair statement that it's the purpose of your testimony to support Entergy's inclusion of the ERS units in its calculation of charges to the operating companies pursuant to Schedule MSS-1?

A. Yes.

Q. To the extent that a company is able to include its ERS units in the computation of MSS-1 payments, it will be either longer or less short than it [89] otherwise would have been, is that a fair statement?

A. That's correct.

Q. Okay. And companies—just for the purpose of the record, is it a fair statement that, for purposes of the calculations

under MSS-1, companies that are long have more reserves than the system average and, therefore, would be the recipients of MSS-1 payments and companies that are short have less reserves than the system average and, therefore, would be payors to the other companies?

A. Long or short, then—you have to also include the load responsibility. You can't just say how much capacity they have. It's a collection of the load.

Q. Okay. It's a function of their load and—let me put it this way. It's a function of their load and their capability as compared to what the system's load and capability are as a whole?

A. That's correct.

Q. Okay. The longer a company is, the more payments it receives. The shorter a company is, the more payments it makes.

A. That's correct.

Q. Now, you're the secretary of the Entergy Operating Committee; is that correct?

A. Yes.

Q. Tell me what the Entergy Operating Committee is.

A. The Entergy Operating Committee is made up of representatives from each one of the legal entities: Entergy Arkansas, Entergy Louisiana, Entergy Mississippi, Entergy New Orleans and Entergy Gulf States, as well as an Entergy [90] representative. And they are the body—that body is the administrator of the system agreement under the terms of the system agreement.

Q. You're the secretary of that committee?

A. Yes.

Q. And have been for approximately how long?

A. Since late '96.

Q. As such, you're generally familiar with the units that are in extended reserve shutdown today?

A. Yes.

Q. Would you agree that currently system wide, Entergy has some 23rd—excuse me, 23 units in extended reserve shutdown totalling approximately 1,284 megawatts?
A. That's correct.
Q. Would you accept, subject to check, that Entergy Arkansas has approximately 506 megawatts in extended reserve shutdown, or maybe you can tell me.
A. Approximately 500, roughly.
Q. Okay. And approximately how much does ELI have in extended reserve shutdown?
A. 150.
Q. Okay.
A. I want to be sure, because I'm just scanning this list.
Q. Okay. I had 157, so I think we're in the same ball park. Would you agree with me that if all units currently in extended reserve shutdown were removed [91] from the calculation of MSS-1, that the charges to ELI under the system agreement would be lower than they are today under MSS-1?
A. Keep in mind that not all of the ERS units that are included in the 1,284 are included in MSS-1 today.
Q. Because of the Gulf States units?
A. Because of the Gulf States—that's correct.
Q. Okay. Taking—just so the record is clear, pursuant to certain provisions of the merger between Entergy—the Entergy Corporation and Gulf States, Gulf States ERS units were not used in this calculation?
A. That's correct.
Q. Okay. For the other four, let's call them the old middle south or Entergy operating companies, would you agree with me that if all units currently in extended reserve shutdown were removed from the calculation of MSS-1 payments, that the charges to ELI, under the system agreement, would be lower than they are today?
A. Yes.
Q. Let's talk for a minute what it means for a unit to be in extended reserve shutdown. First, units in extended reserve

shutdown are not currently operational; is that a fair statement?
A. That's correct.
Q. That is, they don't produce electricity, correct?
A. Not today.
Q. Not today. They don't currently produce electricity, correct?
[92] A. That's correct.
Q. And these units cannot be brought on line in a matter of minutes or hours or days or even weeks to serve load; is that a fair statement?
A. Depends on how many weeks you want to—
Q. Oh, less than four.
A. That's correct.
Q. Okay. Fuel is not procured for these units on a current basis; is that correct?
A. That's correct.
Q. These units do not have operational staffing currently; is that correct?
A. That's correct.
Q. Off system energy sales cannot currently be made from these units; is that correct?
A. They're not running, so no energy is being produced.
Q. Is—are the Entergy companies dispatched on some centralized basis?
A. Yes.
Q. How does that work? Would you explain that for the record?
A. The total system requirements are met with a combination of owned generation plus purchases. And when I say, requirements, that's the load of the entire system plus any sales we may have to be making. The dispatch center in The Woodlands commits units and dispatches those units to meet those requirement without regard what individual operating company owns that particular generation. It's trying to meet the total system requirements. Once a set of units are com-

mitted, then the computer system—actually the computer system is located in Pine Bluff, [93] Arkansas, but the dispatchers are located in The Woodlands, Texas. The computer system decides on a minute by minute basis, second by second basis, what units need to move in order to respond to the changing load requirement.

Q. In general, without regard to reliability issues, is it a fair statement that units are dispatched in inverse order of cost? The cheapest units are dispatched first.

A. Once you have a certain set of units committed—I mean, there are certain, as you mentioned, reliability concerns where you have to have units on line to meet voltage concerns, et cetera. But, in general, that's correct.

Q. Okay.

A. The next increment will come from the next cheapest source to generate.

Q. The system operator who dispatches these generating units and the purchased power to serve Entergy's system load cannot rely on the units in extended reserve shutdown when it's making his choice as to which units to dispatch, correct?

A. That's correct.

Q. Now, some of the units that are in extended reserve shutdown have been used as a source for parts needed by other generating units which are, in fact, operational; is that correct?

A. I've been told that by plant operations, yes.

Q. Okay. Did you look at the data requests that were propounded to the company regarding these ERS units?

A. I looked at some, yes.

Q. Okay. You're aware that we asked the question, "Please state whether any of the ERS units have been utilized as a source of parts for other operating units," [94] correct?

A. Yes.

Q. And you saw that question?

A. Yes.

Q. Okay. And did you see the answer?

A. No.

Q. Okay. If I might, Your Honor, mark this as Commission Staff Number 5. I believe all we've put in is our testimony so far. Mr. Catlin, having missed his plane, is going to give me a hand here. For the record, this document is entitled, "Entergy Louisiana, Inc., Louisiana Public Service Commission Docket Number 20925 (FRP) Response of Entergy Louisiana, Inc. To LPSC data request 4-11." And that data request reads, "Please state whether any of the ERS units have been utilized as a source of parts for other operating units. If so, please provide complete details." Does the statement on this page that seven of the ERS units have been used as a source of parts for other operating units comport with your understanding?

MR. ANDERSON: Objection, Your Honor. I'd like to object to this question and this line in terms of relevance.

MR. ZIMMERING: And what specifically? I'm sorry. I didn't hear you Wayne.

MR. ANDERSON: I would like to object to this question and this line of questioning in terms of relevance.

MR. ZIMMERING: Well, Mr. Catlin testified that the company may not have [95] complied with the provisions of the Federal Energy Regulatory order as to when these units can be included, in fact, as ERS units and there are a series of criteria set forth in that order and—excuse me, in the revised service schedule 10.02 and whether or not these units can, in fact, be relied upon will make a difference—we believe makes a difference as to whether they satisfy those criteria.

MR. ANDERSON: Your Honor, I don't know if you've looked at the criteria listed in service schedule MSS-1 at section 10.02, but whether or not parts have been removed from an ERS unit is not a criterion that is listed in that service schedule. And, in fact, whether a part has been removed from

an ERS unit is completely irrelevant to the criteria listed in service schedule MSS-1. And so I reiterate my objection that this line of cross-examination and this question is irrelevant.

MR. ZIMMERING: Your Honor, just so the criteria are on the table. I find that an incredible statement, Mr. Anderson.

MR. ANDERSON: Thank you.

MR. ZIMMERING: The criteria that—the operating committee's decision to consider an ERU—ERS unit available to meet future system requirements shall be evidenced in the minutes based on consideration of current and future resource needs, the projected length of time the unit would be in ERS status, the projected cost of maintaining such unit and the projected cost of returning the unit to service. If these units have been cannibalized, as the company agrees they had, it certainly makes a difference or it certainly is a factor to be considered when projecting the cost of returning the units to service.

[96] MR. ANDERSON: May I respond, Your Honor.

JUDGE DEVITIS: Yes.

MR. ANDERSON: The criterion—the criteria that Mr. Zimmering read did not include whether parts had been removed from the ERS units. If Mr. Zimmering wants to plumb the reasonableness or plumb whether the company believes that it met the criteria set out by the FERC, that's one thing. But the question of whether parts have been removed from ERS units is not one of the things that he just read to you. It's not one of the criteria and that's the point of my objection.

JUDGE DEVITIS: I'm going to allow the testimony. While it doesn't specifically say from the part you read about removing parts, I think whether or not the unit—parts of the unit are there would influence whether it could be put into use or not. Please proceed.

MR. ZIMMERING: Thank you, Your Honor. Does this comport with your understanding that seven of the 23 units have been utilized as parts or other operating units on the system?

MR. TURNER: Yes.

MR. ZIMMERING: Okay. Your Honor, we would offer into evidence Commission Staff Exhibit Number 5.

MR. ANDERSON: We object on the grounds of relevance, Your Honor.

JUDGE DEVITIS: Having already ruled that the testimony is relevant, we'll accept into the record LPSC Number 5, the data request, response to the fourth set of data request number 11.

MR. ZIMMERING: Thank you, Your Honor. Is it a fair statement that it might [97] take 12 months or more, depending on the unit, to bring some of these generating units back on line from the time the decision is made to bring them on line?

MR. TURNER: I've been told by plant ops that they need six to eight months to bring a portfolio of these units back into service. I believe you asked me in my deposition what if we bring the entire fleet, all 23 units, back and that's when I gave you the 12 to 18 months answer.

Q. Okay. So, if the whole compliment were brought back, it could take as long as 18 months until the last of the units were brought back on line?

MR. ANDERSON: Objection, Your Honor. Does he mean by the question, if the whole compliment were brought back at the same time?

JUDGE DEVITIS: Yes, please clarify your question.

MR. ZIMMERING: I'm sorry, Your Honor. What did you mean in the answer you just gave me?

MR. TURNER: If all—if the entire fleet of ERS units were brought back at the same time, the entire fleet, all 23, it could take as long as 12 to 18 months to affect at least some portion of that.

Q. Units that are in extended reserve shutdown are inactive—they're nonoperational, correct? Today.
A. Today, that's correct.
Q. Do you agree that one reason that Entergy places units in extended reserve shutdown is because they are the least economic to run of all of the units on the system?
A. That would've been a reason why they were not running at the time that they [98] were put into service. That was just one factor that was considered and it was determined that we could save even more money by just not having then run at all.
Q. Okay. Let me go back. I think you said, when they were put into service. Did you mean to say, when they where first put into extended reserve shutdown?
A. That's what I meant. Yes sir.
Q. Okay. Some of the units that were placed in extended reserve shutdown were in poor physical condition; is that a fair statement?
A. Yes.
Q. Now, in September of this year, the Entergy Operating Committee met—excuse me. In September of 1997, the Entergy Operating Committee met and declared that each and every one of the 23 Entergy units in extended reserve shutdown will be available to meet future system requirements; is that a true statement?
A. What the Committee—I made the presentation to the Committee and what I've read out of Section 10.02 of the Committee, the four factors that have to be considered, and,

based on those factors, they agreed that, yes, these units should be included in MSS-1 purposes.
Q. Are the—did the Operating Committee meet and declare that each and every one of the 23 units in extended reserve shutdown will be available to meet future system requirement?
A. They looked at the criteria in Section 10.02. The question that was put in front of then, should these units in ERS continue to be counted for MSS-1 purposes. And, again, I need to qualify that as to the non-GSU ERS units.
[99] Q. Right.
A. That was the question that was put in front of them. They decided that, based on our current and future resource needs, the projected length of time the unit would be in ERS status, projected cost of maintaining the unit and the projected cost of returning the unit to service, that they should be declared available for MSS-1 purposes.
Q. Let's turn to Exhibit 1, page 8 of 10. Now, Mr. Anderson, as I understand it, the names of the units in extended reserve shutdown are not—the company doesn't consider those sensitive or highly confidential.

MR. ANDERSON: No. That's a correct understanding.

MR. ZIMMERING: Good. Okay. Let's take a look at the units in extended reserve shutdown as they appear on KMT Exhibit 1, page 8 of 10, okay?

MR. TURNER: Yes.

Q. Now, one of the criteria that you indicated that the Operating Committee looked at in making the decision that these ERS units should be included for purposes of MSS-1, because the criteria in 10.02 were satisfied was, the projected length of time the unit would be in ERS status, correct?
A. That's correct.
Q. Okay. Now, let's take a look at page 8 of 10, KMT Exhibit 1. First of all, we're all in agreement, aren't we, that

none of these units here has been out of ERS status, for example, in 1997 or 1996?
A. That's correct.
Q. Okay. None of them are coining out in 1998, correct?
[100] A. That' s correct.
Q. When will Neches-6, the very first one on the left-hand side come out of ERS?
A. I believe that's Neches-8.
Q. Oh, I'm sorry. I've got a bad copy here. Let's call it Neches-8. When will it come out of ERS?
A. I can't give you a definitive date when any of these units on this page will come out of —all I can say is, that we have resource needs; we look at those needs each summer; actually, each fall, in preparation for the following summer and, based on what the most economical choice to make is, we will decide whether or not we will bring these units back.
Q. Okay. So, you can't give me a day, a week, a month or even a year for any of these 24 units?
A. I can't, and I don't think it would be prudent to do so, because it gives us flexibility to wait until it's closer to the time of the need. And, if there's a cheaper alternative, it's better for the ratepayers to take that cheaper alternative rather than set a date certain to bring Neches-8 back in service.
Q. Okay. You state in your testimony—let's turn over to your testimony on page 5, line 10. You state that "In our view . . ."—I take that that's either the view of Entergy or the view of the Operating Committee?
A. I believe what I'm discussing here is the presentation I made to the Operating Committee, and I believe in our view—what I intended that to mean is from my position as Director of Resource Planning.
Q. Okay. You say the ERS units would be needed in the relative near term, [101] correct?
A. That's correct.
Q. And by "relative near term" that means to you any time within the next 10 years, right?

A. Yes.
Q. So, there's no sheet, for example, that's comparable to KMT-8—excuse me, KMT-1, page 8 of 10, that the Operating Committee adopted that's got like a month and a year next to every operating unit—excuse me, next to every unit in ERS indicating when it's going to come out?
A. That's correct.
Q. Is it your understanding that many of the generating units in extended reserve shutdown have been there for more than 10 years?
A. I can't, sitting here today, recall when each one of them went in, but, in general, they went in in '87, in that time period.
Q. Okay. Would you agree or accept, subject to check, that each and every generating unit that is in extended reserve shutdown has been in that status for at least seven years?
A. That sounds reasonable.
Q. Okay. And, as you said, you're aware that some go back to the beginning of '87, early '86?
A. Yes.
Q. Okay. Would you turn to KMT Exhibit 1, page—oh, I'm sorry. Stay with page 8 of 10 for a second. I'm not going to talk about the numbers specifically, [102] but so the record's clear, this says, proposed return to service units by NPV. That's net present value, and then (investment plus five year operation and maintenance per kilowatt), correct?
A. Yes.
Q. And up along the left-hand column are the dollar amounts per kilowatt that the company estimates it would take to bring each of those units back on line, correct?
A. To bring them back on line and operate for a five-year period.
Q. Okay. So, this includes any capital investment that's required, any initial operation and maintenance, plus ongoing O&M for five years, present valued?
A. Yes.

Q. Okay. You didn't perform any of the analyses of what would cost to return these units to service; is that a fair statement?
A. That analyses was done by plant operations. I did not myself no, nor my staff.
Q. Well, at the time you reported to the Operating Committee as to what it would cost to return these units to service, you hadn't seen any of the studies that had been performed; is that correct.
A. That's correct.
Q. And, as of the time that you were deposed in this case on January 12, you still hadn't seen any of these studies; is that correct?
A. Only because I—all I needed from plant ops was the dollars. I didn't need to look at the studies myself.
Q. You didn't direct that these studies be performed, is that correct?
A. That's correct.
[103] Q. Now, these studies weren't performed by Entergy personnel, were they? They were performed by an outside contractor called Raytheon, Corporation; is that correct?
A. Some of the studies—I mean, some of the numbers that are in this presentation were developed by Entergy personnel, plant ops personnel. Those numbers were then refined by the use of an outside consultant called, Raytheon.
Q Well, let me ask you if this is a true statement: Some Entergy people actually went out, but it was more of a learning experience for them just to observe. But, as far as participating in the study, no Entergy people did it.
A. I believe that you're reading that from my deposition, and I was talking about my staff, not Entergy personnel. There were plant ops personnel that worked with Raytheon on this, but my staff went as a learning experience.
Q. Are you an engineer?
A. No.

Q. You wouldn't be qualified to perform any analysis as to what it would cost to return a generating unit to service; is that a fair statement?
A. That's correct.

MR. ZIMMERING: All right, Your Honor, I've got—Mr. Anderson, I'd like you to take a look at these. All three of these pieces of paper come out of data responses and all three of these pieces of paper have highly sensitive stamped all over them. And I apologize, Your Honor, particularly for this one, but we didn't reduce this in size. I believe Entergy may have, to make it difficult to read, but this wasn't our doing.

[104] MR ANDERSON: Oh, now, wait a while. If I get chided about enemy and stuff like that—that was a pretty cheap shot.

MR ZIMMERING: Let me tell you—let me identify these for the record. The page that says, "Assumptions" and has page two at the bottom, and the page that says "Entergy Return to Service Program Update of Estimate Dollars Per Kilowatt Total All Units"—both come out of the Raytheon Study that was provided to us in response to data request 4-12. The document with the relatively small print came out of data request—came in response to data request 4-10 which asks, "Please comply—provide complete work papers and supporting documentation for the NPV figures shown on page 8 of KMT Exhibit 1. Include a copy of the analysis on diskette in spreadsheet format." I'm open to suggestions how you want me to proceed, because I'm going to ask him about numbers.

MR. ANDERSON: Well, I guess it would depend on what you're going to ask him, Paul.

MR. ZIMMERING: I'm going to ask—Your Honor, I'm going to ask about the dollar figures that it's going to cost to bring these units out of extended reserve shutdown.

MR. ANDERSON: Are you going to be comparing, for example, a dollar figure on—

MR ZIMMERING: Yes.

MR ANDERSON: —out of the Raytheon to the other one? Can you just ask him about the differences that may exist between Raytheon and 4-10, or do you have to use the real numbers? I mean, if you've got to use the real numbers, then [105] I'll ask that this portion of the record be sealed.

MR ZIMMERING: That's okay, Your Honor.

JUDGE DEVITIS: Okay. Before we proceed, is there anyone present who is not privy to confidentiality agreement?

MR. ANDERSON: Mr. Chavanne. Mr. Chavanne has chosen to not sign.

MR JOHN CHAVANNE: Your Honor, I'll be glad to leave.

JUDGE DEVITIS: Thank you. We'll be sure to send someone out to let you know when it's completed.

MR ZIMMERMAN: Mr. Chavanne, before you leave, if I just do the Delta's on these?

MR ANDERSON: It's not a problem for me.

MR. ZIMMERING: The difference in costs. Let me try it that way and then maybe Mr. Chavanne can stay here. Okay?

MR. ANDERSON: And, in that event, Your Honor, I don't believe there's any need to seal the record if we're just talking about the Delta's.

MR. ZIMMERING: Okay. Let's take, first of all, the piece of paper marked "Proposed Return to Service Units"—the one on the small graph paper. Can you tell me what this document is designed to represent?

MR. TURNER: I believe that this document is to represent where the—or the breakdown of the numbers that went into

the chart that was presented to the Operating Committee in September.

Q. Okay. And the chart that was presented to the Operating Committee is your Exhibit 1, page 8 of 10?
[106] A. Yes.
Q. Okay. Now, these were not based upon the Raytheon study?
A. These were done prior to the Raytheon study being completed, that's correct.
Q. Okay. You delivered your presentation to the Operating Committee September—help me out here.
A. September 30.
Q. September 30—
A. 1997,
Q. Okay. And then you received the Raytheon report sometime in November of 1997?
A. I don't recall, but it's in that—it was sometime after September 30.
Q. Okay. Have you had another Operating Committee meeting since the time that you received the Raytheon report?
A. We had another meeting in October, and I don't recall whether we had the Raytheon report at that time. I don't think so.
Q. Okay. And so you haven't presented any figures from the Raytheon report to the Operating Committee yet?
A. No.
Q. Okay. Let's take a look at Neches Station Unit Number 5, okay?
A. Okay.
Q. I'm sorry. Let's look at Neches 8, okay? It's at the very top of the chart on the small graph, okay?
A. Okay.
[107] Q. It shows it's 105 megawatts.
A. That's correct.
Q. Okay. Now, you have a column called, "Return to Service Capital" and then you have a column called, "Start-up

Capital." Can you tell me what those two columns mean? I'm not asking for the dollar figures here.

A. Well, the first column is the capital investment to return the service to unit. And then there's—or return the unit to service. And the start-up capital, I'm not sure I understand the distinction between the two. To me, capital dollars to get the unit up and running are the same.

Q. Okay. So, some may be spent on what we would call capital or more long-term expenditures and some may be spent doing the immediate O&M necessary to get the unit going?

A. I guess so.

Q. As opposed to the third column in which says "Five-year NPV Investment and O&M." That's talking about ongoing O&M, correct?

A. I don't—okay, yes, the third column. Yes, that's—

Q. But the two columns we would look at to talk about what—to figure out what it's going to cost to get these units up and running are the return to service capital and the start-up capital, correct?

A. Yes.

Q. Okay. Now, I want you to take a look at the sheet marked "Highly sensitive." Excuse me, they're all marked highly sensitive. The one called, "Entergy Return to Service Program Update of Estimates." And you know what I should do right [108] now, let's mark the graph that we were just referring to, "Commission Staff Number 6." That's the one we were just referring to, Your Honor. Let's mark the large table, "Commission Staff Number 7." And, just so we get them all out of the way, let's mark the one that says, "Assumptions", Commission Staff Number 8. Your Honor, could I ask that we go into confidential mode? I'm sorry, Mr. Chavanne. I just think we need to actually talk about all the numbers, if that's—is that okay, Your Honor.

JUDGE DEVITIS: Yes.

MR ZIMMERING: Thank you.

(REPORTER'S NOTE: Confidential dialogue begins and is enclosed under separate cover.)

JUDGE DEVITIS: I might just inquire. Have we reached a point where we can invite Mr. Chavanne back in or are we continuing?

MR. ZIMMERING: Are these—let me ask. Are questions—the answers to LPSC 4-8 dealing with your ongoing expenses for the ERS units, is that confidential? If not, we can bring him back in.

MR. ANDERSON: Let me have just a moment, Your Honor, to look at 4-8.

JUDGE DEVITIS: Certainly. We'll take a short break.

(OFF RECORD)

(BACK ON THE RECORD)

JUDGE DEVITIS: Let's go back then.

MR. ZIMMERING: Thank you. The next exhibit is Commission Staff Number 9; is that a fair statement. Okay. Mr. Turner, Mr. Catlin is distributing a response [109] to LPSC 4-8, which I've marked as Commission Staff Number 9 entitled, "Fossil Operations Responsibility View O&M For ERS Units 1997 Actual and 1998 Budget." Am I reading this correctly that these are the amount of dollars that are spent—that were spent in 1997 for whatever upkeep is necessary on the ERS units?

MR TURNER: Well, with two exceptions: It also includes two units that are currently operating simply because we couldn't break it out. Mablevale Unit Number 3 is operating and that's included with Mablevale 1, 2 and 4, 22,401. Paterson Unit 5 is operating and that's included in the 188,289, Patterson 3 and 4.

Q. And that's simply because there are operational units physically sited at the same location with ERS units?
A. And the charges are not broken down by unit; it's by plant.
Q. Okay. With those two exceptions contained in the double asterisks and the triple asterisks and the two estimates, these are expenditures which are made notwithstanding that the units are in ERS? In other words, these are ongoing upkeep expenditures that necessary even though the units aren't currently running?
A. That's correct.
Q. Okay. Do you have any reason to believe that ELI is not including the costs associated with Monroe 10, 11 and 12 and Thibodeaux 9 in its cost of service that it uses for computing its formula rate plan filings?
A. I have no idea what is included and what is not included. I cannot even hazard a guess.
Q. Okay. Nobody has informed you that the company is eating these [110] expenditures, have they?
A. No one has told me one way or the other.
Q. Okay. Your Honor, if you would give me about one minute, I may be just about done.

JUDGE DEVITIS: Okay.

MR ZIMMERING: I'm done, Your Honor. Thank you very much, Mr. Turner.

JUDGE DEVITIS: Okay. Mr. Turner, would you please give me your understanding or definition of how you would decide what categories to include a unit when you're doing—that should be included in MSS-1 or not?

MR. TURNER: MSS-1, Section 10.02 of the system agreement was modified per the terms of FERC 415, 415-A.

Q. And when was that modified?
A. The date of the order—415 was issued August 5, 1997, and I'm not sure that I've got 415-A.

MR ANDERSON: I have 415-A, Your Honor. It's already in evidence. It was issued by the FERC on February 3, 1998.

MR TURNER: And page 3 of 10 of Exhibit KMT-1 is the language I lifted out and read to the Operating Committee that specifies the factors that the Operating Committee must consider in order to declare a unit that's in ERS as available under terms of MSS-1. I'll be glad to read that for you if you'd like.

JUDGE DEVITIS: Have you already testified to that earlier today?

MR. TURNER: It's in my testimony that was filed earlier. Yes, ma'am.

JUDGE DEVITIS: Thank you, Mr. Turner. Mr. Anderson.

[111] MR ANDERSON: Yes, I have a few questions. Thank you. Before I begin, however, Your Honor, I observed that Staff Exhibit Numbers 7 and 8 are two pages from a study called the Raytheon study that was provided in response to LPSC Data Request 4-12. As a matter of completeness, we would like to offer the entire study. It's been marked as highly sensitive, but the difference between putting in two sheets and putting in the entire study, which is about 3/8 of an inch thick, you know, in for a penny, in for a pound. And so we'd like to offer the whole thing, because we don't believe it's appropriate to just lift two pages out of the study and just submit those. I have the same comment with respect to Staff Exhibit Number 9, which is the second page of a two page data response to LPSC Data Request 4-8, and I would propose to mark for identification as the Raytheon study, ELI Exhibit—I believe my next number is 15, Your Honor. No, maybe it's 14. It's 15. I'm corrected. We would like to mark as ELI Exhibit 15 the entire Raytheon study which was appended to the company's response to the LPSC Data Request 4-12. We'd like to mark for identification as ELI Number 16 the entire response of the company to LPSC 4-8.

MR. ZIMMERING: I don't have any objection to 15. I have an objection to 16. The response to answer 4-8A, in my opinion, is simply self serving and if they wanted to get that in, they should've had a witness testify to it.

MR. ANDERSON: Your Honor, I respectfully submit that he doesn't get to just put in one piece of the answer. In fact, the piece that he attempts to put in is responsive to question B, and the response to B begins on the first page. So even though he may view our response as self serving, it is our response. And under—[112] whether you view it as opional completeness or whatever the term may be at the Louisiana Commission, if he's going to offer a portion of a response, we should be entitled to offer the entire response.

JUDGE DEVITIS: I'll accept into the record the LPSC Number 8 in its entirety.

MR ZIMMERMAN: I hate to interrupt you, Mr. Anderson. I may have neglected to move Commission Staff 5 through 9 into the record, and I would so move now while we're in this mode.

MR. ANDERSON: I believe 5 has gone in over my objection already.

JUDGE DEVITIS: That's correct. We had 6, 7, 8 and 9.

MR ANDERSON: My objections to 7, 8 and 9 cured by my having offered ELI Exhibits 15 and 16, and I have no objection to Staff Number 6 except that I also have trouble reading it.

JUDGE DEVITIS: I think we will all need magnifying glasses, yes. Are you going to offer a blown up—

MR. ZIMMERING: We'll be happy to undertake that, Your Honor.

MR ANDERSON: Your Honor, rather than blow up the photocopy, there must be a larger version of the original;

although, I don't know and I'm looking at my witness, and I don't know that he knows, because he testified this is not his piece of paper.

MR. TURNER: I suspect that there is.

MR ANDERSON: We will endeavor to obtain whatever generated this set of numbers in their original form and provide the larger copies to parties who have executed the confidentiality agreement and we'll submit it under seal for [113] the record.

JUDGE DEVITIS: I would appreciate that. While it is physically possible to read the numbers, it is (UNINTELLIGIBLE).

MR. ANDERSON: When you get to be my age, I don't even know that it's physically possible, Your Honor.

JUDGE DEVITIS: My bifocals must be better. I can read it.

MR. ANDERSON: Oh, okay. Well, they are better. No matter. We'll try to—let us first try to obtain the original copy and, failing which, we'll provide a blow up.

JUDGE DEVITIS: I think if you just make it a little bit larger (UNINTELLIGIBLE).

MR ANDERSON: All right and, with that, let me begin my re-direct of Mr. Turner. Oh, then before I do that, I'll ask my colleague—we now have 8 1/2 by 11 inch copies of the demonstrative for ELI Exhibits 12 and 13, and I'll ask that those be distributed to the parties and to the court reporter and to Your Honor.

RE-DIRECT EXAMINATION BY MR. ANDERSON:

MR. ANDERSON: Mr. Turner, do you have Staff Exhibit Number 6 in front of you?

MR. TURNER: That's the one that's hard to read?

Q. Yes, hard for me to read.

A. Yes, I have it.
Q. Do you have an understanding as to what organization within the company prepared that?
[114] A. The information was requested of plant ops. The numbers themselves came from plant ops.
Q. What is plant ops?
A. Plant ops is the organization who is physically responsible for the power plants. All the people that work in the plants and that sort of thing.
Q. Is that a euphemism for plant operations?
A. Yes.
Q. Okay. And are you in plant operations?
A. No.
Q. Were these data supplied to you?
A. Yes.
Q. Why?
A. In preparation for the Operating Committee meeting where we were—the Operating Committee needed to decide whether or not these units would be included in MSS-1—these ERS units would be included in MSS-l. One of the factors had to be—that needed to be considered was the cost of bringing these units back into service.
Q. All right. Now, take a look at Staff Exhibit Number 7.
A. That's the one that's labeled "Entergy Return To Service Program Update of Estimate"?
Q. Yes.
A. Okay.
Q. What does the dollar symbol "K" mean?
[115] A. It's in thousands of dollars.
Q All right. So, I should add three zeros to the left-hand side of the decimal point on all these numbers?
A. Right.
Q. Was this report prepared by you?
A. No.
Q. Does Monroe Station Unit Number 10 appear on Staff Exhibit 6 and Staff Exhibit 7?

A. Yes,
Q. Can you tell me if the combination of return to service capital and start-up capital on Staff Exhibit 6 is greater or smaller than the total for Monroe Station Unit 10 on Staff Exhibit 7?
A. Smaller.
Q. Smaller on which one?
A. Smaller on Staff 7 than on Staff 6.
Q. Is Monroe Station Unit 10 an ELI unit?
A. Yes.
Q. What if I asked you to make the same comparison for Monroe Station Unit 11?
A. Same answer. It's smaller on 7 than it is on 6.
Q. Okay. And what if I asked you to make that comparison for Monroe Station Unit 12?
A. It's smaller on 7 than it is on 6.
Q. What about Thibodeaux Station 9?
[116] A. It's smaller on 7 than it is on 6.
Q. And what are you comparing when you say its smaller on 7 than on 6?
A. I'm comparing—on Staff 7 I'm looking at the total most right-hand column that's labeled "Total" and on Staff 6 I'm looking at the column labeled "Five Year NPV."
Q. Okay. Now, instead of looking at the five year NPV, I want you to look at return to service capital and start-up capital. Do you see those columns?
A. Yes.
Q. If you compare the total of those two columns—
MR ZIMMERING: Excuse me. Could you hold on one second? I just lost you for a minute. Could you start that question again?

MR. ANDERSON: I'll be glad to.

MR ZIMMERING: Thank you.

MR. ANDERSON: I've understood your answers thus far, Mr. Turner, to be a comparison between Staff Exhibit

Number 7, the column marked, "Total" and Staff Exhibit Number 6, the column marked "Five Year NPV."

MR. TURNER: That's correct.

Q. Okay. Now, I'm going to ask you similar questions, but, in this case, I want to compare Staff Exhibit Number 7 total to the combination of two columns on Staff Exhibit 6. And those two columns are marked "Return to Service Capital" and "Start-Up Capital."
A. Okay.
Q. All right. With respect to Monroe Station Unit 10, which is larger: The [117] combination of the two columns on Staff Exhibit 6 that appear fourth and fifth from the left or the total column from Staff 7?
A. Staff 6 is larger.
Q. Okay. And if I ask you about Monroe Station Unit 11, what would your answer be?
A. Staff 6 is larger.
Q. All right. And if I ask you about Monroe Unit 12?
A. Staff 7 is larger.
Q. All right. And if I ask you about Thibodeaux Station—
A. Staff 7 is larger.
Q. All right. And I'm assuming that Thibodeaux Station on Staff 6 is number 9. Do you know one way or another?
A. I do not know. Hang on. I may have—no, I do not know.
Q. Do you have before you a copy of this one page out of the IRP that was—I don't know if a copy was ever provided to you.
A. I don't believe.
Q. All right. I'm going to provide a copy to you.

JUDGE DEVITIS: It's not provided to the court either.

MR. ANDERSON: Well, it hasn't been offered into evidence and it's probably the better part of valor that—since I'm not going to offer it. Am I correct that that analysis compares various strategic alternatives for the year 2005?

MR TURNER: Yes.

Q. Did the FERC, when it amended MSS-1, require the company to consider all [118] strategic alternatives in—as part of any criterion for the determination to be made with respect to the ERS units, MSS-1?

MR. ZIMMERING: I'll object. The FERC order says whatever it says.

MR ANDERSON: Well, let me rephrase the question.

JUDGE DEVITIS: All right.

MR ANDERSON: At the time that you made your recommendation—no, strike that. At the time that you made your presentation to the Operating Committee, was it your understanding that the FERC order required a consideration of these strategic alternatives?

MR TURNER: No.

Q Do you know how many pages there were to the 1995 IRP?
A. It's probably a half inch thick. I don't know how many pages.

MR ANDERSON: That's all we have, Your Honor. Thank you.

JUDGE DEVITIS: Thank you, Mr. Anderson.

MR. ZIMMERING: Nothing else, Your Honor.

JUDGE DEVITIS: Thank you, Mr. Turner.

MR TURNER: Thank you.

MR ANDERSON: Insofar as we lost Mr. Fontham, is this an appropriate place to stop for the day?

JUDGE DEVITIS: It was my understanding that the parties were wanting to conclude around 4:00. We appear to be close to that.

MR. ZIMMERING: We made that request. We'll take responsibility for that, Your Honor.

FORMULA RATE PLAN 1997 ANNUAL FILING
ENTERGY LOUISIANA, INC., (FORMALLY LOUISIANA POWER & LIGHT), EX PARTE IN RE: INVESTIGATION OF LOUISIANA POWER & LIGHT COMPANY'S RATES, CHARGES, SERVICE RENDERED AND OPERATIONS (FORMULA RATE PLAN)

DOCKET NUMBER U-40925

(Hearing held February 17, 1998 before ALJ Carolyn DeVitis)

WITNESS

BRUCE M. LOUISELLE-ENTERGY

* * * *

[37] that you all pile up, over the course of the year, this capital?

A. It isn't capital, Mr. Fontham. We don't pile up capital over the course of a year, and in fact, you've made a factual statement about a hypothetical that has no basis in reality. There is no adjustment proposed by company because no adjustment would be appropriate. To do so, in fact, would deny the company, further, the opportunity to recover its actual cost of capital.

Q. Okay. I'm going to switch over to another subject, this ERS subject. You're familiar with the system agreement; is that right.

A. Yes, sir.

Q. Now, the system agreement provides for the sharing of cost capacity; is that true?

A. Yes, sir. I'm sorry—reserve equalization?

Q. Yes

A. Yes. It does not provide for sharing of all capacity cost, no.

Q. Texas is over here and Arkansas is up here, Mississippi is over here. Louisiana here, and N.O. is here. (INDICATING

AT EASEL) Now, the company has operations in each one of thoses geographic areas; is that right?

A. Yes.

Q. And, the system agreement provides for the sharing of the cost of reserves in four or five companies in the different jurisdictions, right?

A. Yes.

Q. Okay. Now would you agree that historically, under the system agreement, before one company had to pay for another company's generators, that generator [38] had to be "available"?

A. That was a description of what capacity was included in the calculation, yes.

Q. And, the company, in the 1980's, decided to adopt a plan to put units into extended reserve shutdown, right?

A. Correct.

Q. Now, that program began in the mid-'80's; is that true?

A. That's my understanding, yes.

Q. And there are units that were put into extended reserve shutdown in the mid-'80's that were two, three years from retirement at that time, right?

A. I don't have those facts in front of me, but I believe that's accurate.

Q. And, the units that were put into extended reserve shutdown that were two or three years from retirement at that time, many of them are still in extended reserve shutdown, right?

A. I can't attest to when each of the—whatever it is—twenty units that are in PRS status now, when they were put in. May be that some were put in in 1987 are still in PRS status.

Q. Well, you're aware, Mr. Louiselle, that the system agreement has been in effect for four or five decades, right?

A. In different forms, yes.

Q. In different forms and, in different forms, the Entergy companies have been sharing the cost of their capacity for that long; is that true?

A. Sharing—you use the phase, "sharing the cost of capacity" and if you use it very loosely, I would agree with it. If you mean that is what the system agreement [39] calls for, then I would have to quibble with that phrase. But, if you just mean that by sharing the cost of capacity that there's a reserve equalization schedule in the system agreement; then I would agree.

Q. Well, would you agree with this? That all of these units that went into ERS status in the mid-1980's, they had been counted for determining a company's capability for the purpose of satisfying its capability responsibility for the purpose of determining whether it had to make payments or get receipts for their lives—their entire lives that they were in service.

A. I'm trying to remember the terms of the system agreement that predated the '82 system agreement, but if we talk about the current form of the system agreement, that's correct.

Q. Well, under the prior form of the system agreement, you still counted the megawatts of capability and the megawatts of load, didn't you?

A. Yes, but I'm thinking back to the original system agreement—it's called service schedule six or some like that. I'm not sure that that would apply—

Q. A dollar ten a megawatt, wasn't it, based on your capability responsibility and your load?

A. I can't remember the terms of that. In any event, at least from 1982 on, I know that that's an accurate statement. I think, under the '71 system agreement, that is accurate.

Q. Well, even though the system agreement required that a unit be available before somebody had to pay for it, like before, Louisiana had to pay for something in Arkansas, Louisiana would have to pay for something in Mississippi, a unit had [40] to be available to give Louisiana some service,

the company continued to count the units they had placed in extended-reserve shutdown as units that were available, right.?

A. I disagreed with the predicate, but the company did continue to count the ERS units as available. I do not believe it's accurate to say that under the system agreement, that the units that were included had to be available to provide service to a particular jurisdiction or company.

Q. Now, LP&L paid their amounts to Arkansas Power and Light and Mississippi Power and Light and had changes in its payments and receipts from NOPSI based on the existence of generating units that were basically in mothballs, right?

A. They were considered available, but they were in ERS status.

Q. Well, as a matter of fact, many of them were being cannibalized for parts and they were considered available by the operating committee, right?

A. Well, I agree with you that certain of the units, the parts were taken and put where—on other units as needed and then replaced the existing unit. Cannibalized is your term.

Q. They've been replaced? Some of the units in ERS?

A. Yes. Some of the equipment that was used for spare parts has been returned to the ERS unit.

Q. I see. After being used?

A. Or replaced.

Q. I see. Okay, now, we know that the FERC has denied the LPSC's request to go back to 1986, provide refunds for the period 1986 to the present, right?

[41] A. Yes.

Q. Okay. But, the FERC has also said that Entergy, when it counted these ERS units as available, made a blatant violation of the system agreement, right?

MR. ANDERSON: Objection, Your Honor. May I have the citation to the Order where it said "blatant violation"?

MR. FONTHAM: I'm asking the witness a question.

JUDGE DEVITIS: What is the nature of your objection?

MR. ANDERSON: If he's going to attribute language to the order, I would have liked to have been told where, in the order, he was referring to. Just so that I can try to keep the record straight. And that was the nature of my objection. If he wants to characterize it—

MR FONTHAM: I'll rephrase the question, Your Honor. It's not worth the—

MR ANDERSON: If he wants to characterize it, he can characterize it any way he wants to; but when he attributes it to the FERC, I would have liked to have had a citation, Your Honor. That's my objection.

JUDGE DEVITIS: All right.

MR. FONTHAM: Mr. Louiselle, do you recall whether the FERC held that the system agreement was clear and unambiguous?

MR. LOULSELLE: I have not memorized the Order, Mr. Fontham. If those words are in it, they are in it. I will look.

MR. ANDERSON: To save time, Your Honor, may I suggest that the Order is in the record and it speaks for itself. Whether Mr. Louiselle can remember exactly where something may be is really not important.

[42] MR. FONTHAM: I'll agree with that. The Order speaks for itself. You do agree, Mr. Louiselle, that the FERC held that Entergy was violating the system agreement, right?

MR. LOUISELLE: Yes.

Q. By including the ERS units as available in their calculation of the company's capability, right?
A. Correct.
Q. All right. And that required LP&L to make payments to other companies that had otherwise wouldn't have had to make, right?

A. Correct. Which the FERC found to be just and reasonable and not unduly discriminatory.
Q. Now, Mr. Louiselle, the—well, let me ask you what your position is. Is it alright to violate a tariff if you think that it might produce a just result to violate the law?
A. My position is that's for the Commission to decide.
Q. All right. Now, can you tell me when the FERC Order changing the system agreement was effective?
A. 1997.
Q. 1997. So, it's after the test year in this case, right?
A. Fall of 1997.
Q. Okay. So, all of the costs that were assessed to LP&L in the test year, were imposed on LP&L in violation of a tariff, right?
A. No, Mr. Fontham, not all the costs in the test year. A portion of the MSS—
[43] Q. All the costs that are in dispute were imposed on LP&L in violation of a tariff, right?
A. The FERC found that the tariff had been violated during that period of time, but that the rates were just and reasonable.
Q. Okay. But did you hear my question? That the cost [sic] that were imposed on LP&L for the ERS units in the test year were imposed in violation of a FERC tariff, right?
A. Resulted from a violation of the tariff.
Q Okay. And, you do understand that in than case, what the staff is proposing is to disallow those costs that were imposed on LP&L in violation of a tariff in the test year. Not all the way back to 1986, right?
A. Well, I understand—well, I'm a little bit confused about what the staff proposal is, because I haven't seen it articulated in testimony. But I believe that that is the current contention that since the FERC refused to order refunds for any period of time that the Commission staff now takes the position that it will extract the same amount for the test year from this Commission's setting of retail rates.

Q. Now, LP&L is as affiliate of Entergy, right?
A. Entergy Louisiana, yes, sir.
Q. And, Entergy Louisiana, Inc. is one of the Entergy subsidiaries, right?
A. Correct.
Q. And, Entergy basically operates its system on a single system basis, right?
A. Correct.
Q. So, the decision that LP&L should have to make these payments for these [44] units as if they were available, it was made by Entergy itself, right?
A. By the operating committee, yes.
Q. Okay. Do I understand this correctly? The company's position is that the Commission has to make ratepayers pay this cost that LP&L had to pay to its sister companies under the decision of the operating committee?
A. As affirmed by the FERC; yes, sir.
Q. Yes. Okay. So, it's the company's position that the Louisiana Public Service Commission, at the retail level, is required to make Louisiana rate payers to pay for a cost that was imposed on LP&L by its parent company in violation of a FERC tariff, right?

MR ANDERSON: Objection, Your Honor.

JUDGE DEVITIS: What's the nature of your objection?

MR ANDERSON: Mr. Louiselle referred to the decision as having been made by the operating committee, not by the parent company. Mr. Fontham, in asking the question, has mischaracterized Mr. Louiselle's answer.

MR. FONTHAM: I think the witness can take care of himself, Your Honor. You know, if Mr. Anderson wants to testify, he should save it for brief.

MR. ANDERSON: It's not a case of Mr. Louiselle taking care of himself. It's a case of trying to keep the record

straight and the operating committee is not Entergy Corporation. Those are separate—

MR FONTHAM: I think counsel knows full well that the operating committee never voted on this. It was all done by a guy—by—

MR ANDERSON: Now who's testifying?

[45] MR. FONTHAM: Well, you're the one who was just testifying.

JUDGE DEVITIS: I think that perhaps if we both revert to where we make only objections that are recognized in the standard objections, such as, hearsay, so on and so forth, we'll proceed that way. And that we don't need the testimony of either of the lawyers at this point. I will be very interested to hear the arguments that (UNINTELLIGIBLE) at the appropriate time. Please proceed.

MR. FONTHAM: Do your recall my question? (NO AUDIBLE RESPONSE) The company is asking this Commission to impose on Louisiana ratepayers a cost that LP&L paid, that Entergy Louisiana paid, as a result of a decision made by Entergy's operating committee to impose a cost in violation of a FERC tariff, right?

MR. LOUISELLE: That is not—that is a correct statement that the company should be entitled to recover those costs, but the company's position—my position is, that to the extent that the staff has an objection to these costs, the proper form is the Federal Energy Regulatory Commission, because these are costs incurred by Entergy Louisiana as a result of a FERC tariff.

Q. No, no. These weren't costs—are you saying that Entergy Louisiana got these costs that were imposed in violation of a tariff as a result of the tariff?
A. Sure. The costs that were incurred by Entergy Louisiana under MSS1 were as a result of a FERC tariff as you argued

that the only place one could get redress was at the FERC. The FERC determined that no redress was appropriate. That the rates actually incurred by these operating companies over the period 1987 thorough 1997 were just and reasonable and not unduly discriminatory.

[46] Q. Mr. Louiselle, do you see me trying to get redress back to 1986 here?

A. No, sir. You're trying to get redress (UNINTELLIGIBLE)

Q. (UNINTELLIGIBLE) what I'm trying to do is point out that you all are including a cost in your cost of service that was imposed on LP&L in violation of a tariff.

A. Mr. Fontham, you are trying to get a refund for the period 1996. You are trying, apparently, to recognize that the rates charged currently under MSS1 are pursuant to a valid FERC tariff. I thought rate making was supposed to be prospective and that we're trying to determine the cost to be incurred during the rate effective period. But, you are trying to go back in time and get a retroactive refund for the calendar year 1996.

Q. Are you proposing that we should update the test year to the rate effective period in this case?

A. No, sir. I'm talking about—rates are prospective.

Q. Let me ask you this, Mr. Louiselle, you're aware that the FERC establishes rates for capability equalization that includes capability beyond the ERS unit; right? The reserve equalization.

A. You say the FERC?

Q. Yes, sir.

A. Are you referring to the system agreement or just generally?

Q. The system agreement. System agreement as regulated by the FERC.

A. Including capability?

Q. Includes capability. You're aware of that?

[47] A. Yes, sir.

Q. Are you aware the fact that curtailable load—okay—if a particular company has a whole bunch of curtailable load, but it happens to be on system at the time of the monthly peak, all right?

A. Yes, sir.

Q. The FERC counts that as if it were any other load.

A. That's correct. Under the system agreement.

Q. Under the system agreement. Entergy's proposal to the FERC, right?

A. Yes, sir.

Q. Okay. And the FERC has approved that, right?

A. Yes.

Q. And, so the fact of the matter is, that LP&L has to pay the other companies the full cost of capacity for any curtailable load that happens to be on the system at the peak, right?

A. It pays—not the full cost of capacity, it pays—makes a reserve equalization payment based upon the formula that's in the system agreement. It doesn't include all capacity.

Q. Well, it gets no credit. It gets absolutely no credit for the fact that that load is curtailable, right?

A. Under the system agreement, that's correct.

Q. Is it your view then, Mr. Louiselle, that because the FERC regulates that and the FERC has decided that it's just and reasonable to give no credit for curtailable load, is it your view that this Commission can give no credit to a curtailable [48] customer for the fact that it's curtailable?

A. The Commission can set rates for the retail customers, consistent with its principles and that are just and reasonable and not unduly discriminatory. If it wishes to provide a credit for that, it can do so. That does not mean then, the Commission has the authority to unilaterally change a FERC tariff.

Q. Okay. So, let me see if I understand this, Mr. Louiselle. If a FERC tariff says that the system, which is planned on a

system basis—if a FERC tariff says that the load on that system is—if it's curtailable, is entitled to no credit and that LP&L must pay the full cost associated with that, the full, you know, charge, under the system agreement, even if it's load is curtailable at the time of the peak. It's your view that the Public Service Commission can do something different and give credit for curtailable load, right?

A. In retail rates?

Q. Yes.

A. Certainly it can.

Q. Okay. But, it's your view that if the FERC has a tariff that the company violates and imposes costs on LP&L in violation of the tariff, this Commission has no right whatsoever to say that the retail rate effective that is, we're not passing it through to the ratepayer, right?

A. No, sir. My position is that the Commission has full authority to go to the proper forum and articulate its case and determine whether refunds are appropriate or not appropriate, and the Commission did precisely that in the ERS case.

Q. Mr. Louiselle, do you have any special experience with regard to what should [49] happen at the retail level with respect to cost that come from the system agreement? Like way back, you know, you went back 31 years, well, let's go back about 21 years. Can you remember what you recommended in 1977 that this Commission do with respect to the capability of LP&L and the sales that it was making to other companies?

A. I do recollect that.

Q. Uh, huh. And, did you recommend that the Commission accept the charges as they were imposed by the FERC under the system agreement as the final just and reasonable remedy?

A. I had filed testimony, initial testimony, indicating that the rate that was paid by Arkansas for energy coming out of

Louisiana was not—have a large enough margin and proposed an adjustment. I believe that was then subsequently changed.

Q. Well, as a matter of fact, in that case it stuck. Is that right, Mr. Louiselle?

A. Yes; but then it was changed.

Q. Yeah. Well, in that case, though, you were the person who was recommending to the Public Service Commission that even though there's a FERC tariff, and even though the Public Service Commission can go to the FERC and it has a forum and all that, that it should not allow Arkansas, under that tariff, to pay less than a fair cost for the capacity in this Commission's view, right?

A. Yes, sir.

Q. Thank you, Mr. Louiselle. That's all I have. Thank you, Your Honor.

JUDGE DEVITIS: Mr. Raborn? (NO AUDIBLE RESPONSE) Mr. Anderson?

[50] MR ANDERSON: Yes. Thank you.

RE-DIRECT EXAMINATION:

MR. ANDERSON: With respect to the ERS matters that counsel for the Commission staff has raised, is the reserve—what is the reserve equalization payment?

MR LOUISELLE: It is a monthly charge that changes every month, dollar amount, total dollar amount. In the case of Entergy Louisiana, because it is a short company—that is, its relationship between capability and load responsibility vis-a-vis those relationships on the system indicate that it is a short company. It then makes a monthly payment based upon a formula contained in the system agreement to equalize reserves relative to its load responsibilities so that it makes this payment and it's calculated based upon intermediate units, oil and gas units, that are physically owned by the companies that are long on capacity.

Q, How does the reserve equalization charge get calculated; through what device?

A. It is a intersystem bill and this bill calculates the MSSl as well as MSS2, 3, all the service schedules. Calculates it monthly predicated on the formula that's contained in the system agreement.

Q. Which service schedule applies to reserve equalization?

A. Service schedule MSS1.

Q. How does reserve equalization relate to a payment for capacity?

A. It is not a payment for capacity. The payment does not entitle the payor to any of the output of the units that are used to calculate its value.

Q. Your Honor, there was much talk this morning in the cross examination of Mr. [51] Louiselle about the system agreement. I know that service schedule MSS1 is in the record, but I'm not sure that the system agreement itself is in the record, and I would suggest that we should probably put a copy of the entire system agreement in the record. I have not done so, but I can have a clean copy prepared and tender it.

MR. FONTHAM: No objection.

JUDGE DEVITIS: How voluminous is it?

MR ANDERSON: About that thick. (INDICATING)

JUDGE DEVITIS: All right.

MR ANDERSON: In that event, Your Honor—

JUDGE DEVITIS: What designation would you make that?

MR. ANDERSON: ELI Exhibit 18.

JUDGE DEVITIS: I believe we have an 18, do we not?

MR ANDERSON: Then, I will make it ELI Exhibit 19. Now, turning to the capital structure issue, Mr. Louiselle, what is a yield to maturity calculation?

MR. LOUISELLE: Yield to maturity calculation, which is the

method that is used or has been used in the case of Entergy Gulf States, is a method of determining the cost of debt that is, rather than relying upon a straight line amortization, basically relies upon a non-straight line. It is a present value concept and it basically calculates a internal rate of return, if you will, that would allow for a constant payment over time to be made up of varying amounts of amortization of the difference between the gross and the net proceeds.

Q. An internal rate of return on what?

* * * *

SUPREME COURT, U.S.
FILED

MAR 3 2003

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No. 02-299

IN THE

Supreme Court of the United States

ENTERGY LOUISIANA, INC.,

Petitioner,

v.

LOUISIANA PUBLIC SERVICE COMMISSION, *et al.*,

Respondents.

On Writ of Certiorari to the Supreme Court of Louisiana

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March 3, 2003

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

47 pp

QUESTION PRESENTED

Whether *Mississippi Power & Light* v. *Mississippi ex rel. Moore*, 487 U.S. 354 (1988), and *Nantahala Power & Light Co.* v. *Thornburg*, 476 U.S. 953 (1986), require a state public utility commission to allow an electric utility member of a multi-state power system to recover, in retail rates, the costs allocated to it by a rate schedule of the Federal Energy Regulatory Commission ("FERC"), or whether the state commission has jurisdiction to decide that it was "imprudent" for such a utility to incur the costs allocated to it under a FERC rate schedule, thereby "trapping" such wholesale costs?

PARTIES TO THE PROCEEDING

In addition to the parties listed in the caption, the five Commissioners of the Louisiana Power Service Commision – Hon. C. Dale Sittig, the Hon. Jack "Jay" A. Blossman, Jr., the Hon. Irma Muse Dixon, the Hon. James M. Field, and the Hon. Don Owen – are Respondents in this proceeding and were Defendants below solely in their official capacities as members of the Commission.

Pursuant to Sup. Ct. R. 29.6, Petitioner Entergy Louisiana, Inc. is a wholly-owned subsidiary of Entergy Corporation Entergy Corporation has no parent company. Old Mutual, the parent company of Barrow, Hanley, Mewhinney & Strauss, owns 11% of the stock of Entergy Corporation. Old Mutual is publicly traded on the London and Johannesburg stock exchanges.

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OPINIONS BELOW

The opinion of the Louisiana Supreme Court (Appendix to Petition for Certiorari ("Pet. App.") 1a-21a) is reported at 815 So. 2d 27 (La. 2002). The order of the Louisiana Supreme Court denying the petition for rehearing (Pet. App. 159a) is not reported. The opinion of the Nineteenth Judicial District Court for the Parish of East Baton Rouge (Pet. App. 22a-23a) is not reported. The order of the Louisiana Public Service Commission (Pet. App. 24a-84a), Order No. U-20925-G, is not reported, but is available at 1998 WL 1285300.

JURISDICTION

The opinion and judgment of the Louisiana Supreme Court were entered on April 3, 2002. Pet. App. 1a. On May 24, 2002, the Court denied petitioner's timely petition for rehearing. Pet. App. 159a. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The pertinent provisions of the Federal Constitution and the Federal Power Act, 16 U.S.C. §§ 791a-828c, are reprinted at Pet. App. 165a-175a.

STATEMENT OF THE CASE

Petitioner Entergy Louisiana, Inc. ("ELI") is a local electric utility that is part of an integrated power system that serves portions of four states. ELI is challenging a judgment of the Louisiana Supreme Court that upheld an order of the Louisiana Public Service Commission ("LPSC") which barred ELI from recovering in its retail rates – and thus "trapped" – certain costs that ELI was required to incur under the FERC rate schedule that governs the wholesale allocations of power and its costs in the multistate Entergy system. The

Louisiana Supreme Court acknowledged FERC's exclusive jurisdiction to determine the lawfulness of the wholesale rate paid by ELI, but held that the LPSC had the authority to determine that it was "imprudent" for ELI to pay this rate because FERC had not yet determined that it was just and reasonable for ELI to incur these costs.

As explained in detail below, this holding is squarely foreclosed by *Mississippi Power & Light Co.* v. *Mississippi ex rel. Moore*, 487 U.S. 354 (1988) ("*MP&L*") and its numerous precursors. *MP&L* held – in the context of the very multistate electrical system at issue here – that state utility commissions are required to allow local utilities to pass through to retail ratepayers the wholesale rates incurred under FERC rate schedules, whether or not FERC has expressly ruled on the state's specific challenge to their reasonableness. It held that if a state commission believes that particular wholesale costs have been improperly imposed, its exclusive remedy is to file a complaint before FERC.

These principles have particular force here. The LPSC previously filed a complaint at FERC and challenged the requirement that ELI pay wholesale rates that included the particular costs that the LPSC disputes, but FERC found that it was "just, reasonable, and nondiscriminatory" for ELI to incur these costs. To justify its prudence disallowance, the LPSC deemed FERC's findings to cover only the costs incurred during the period that ended on August 5, 1997, and *not* the subsequent days and months. It then based the prudence disallowance on parochial local interests that are impermissible factors under the FERC Order. This was a paper thin attempt to evade FERC's jurisdiction on the issue and its prior rejection of the LPSC's challenge to the very costs at issue.

1. The Federal Power Act. The Federal Power Act gives the Federal Energy Regulatory Commission ("FERC") exclusive jurisdiction to regulate the "transmission" and the "sale of electric energy at wholesale in interstate commerce."

16 U.S.C. § 824. The Act provides that all rates and charges, and all rules and regulations affecting such charges, must be "just and reasonable" (*id.* § 824d(a)) and nondiscriminatory (*id.* § 824d(b)).

To enable FERC to enforce this prohibition, Section 205(c) of the Act generally requires public utilities to file with the Commission "schedules" or "tariffs" that show all their rates and charges for wholesale sales of electricity and the classifications, practices, and regulations affecting such charges, together with all contracts which in any manner affect or relate to such charges. *Id.* § 824d(c). The Act generally prohibits changes in any rates, classification, or services except following sixty days notice. *Id.* § 824d(d).

But the Act provides that FERC may, "for good cause shown," enter orders allowing changes to take effect on lesser notice (or without notice). *Id.* Pursuant to this latter authority, FERC has authorized utilities to file tariffs that do not provide a specific dollar charge for a unit of electricity, but that contain "automatic adjustment clauses" or other cost of service formulas that the utility applies to determine some or all components of the actual unit charge. FERC approves "formula" rates for transactions (*e.g.*, certain transactions among affiliated utilities) in which it finds that the costs of rate filings are great and the benefits are slight because the Act's other remedies are sufficient to allow FERC to assure that rates are just, reasonable and nondiscriminatory.[1] When formula rates are authorized, the filed rate is not a dollar charge per unit of output, but a formula that is applied by the utility, subject to audit and review by FERC in other proceedings.

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[1] *See Middle S. Servs., Inc. (Opinion No. 124)*, 16 FERC ¶ 61,101, at 61,219 (1981), *aff'd, Louisiana Pub. Serv. Comm'n* v. *FERC*, 688 F.2d 357 (5th Cir. 1982); *Middle S. Servs., Inc.*, 30 FERC ¶ 63,030, at 65,131-32, *aff'd*, 31 FERC ¶ 61,305, at 61,660 n.25 (1985); *Central Power & Light Co.*, 11 FERC ¶ 61,102, at 61,228 (1980).

In this regard, Section 206 of the Act gives FERC the authority to investigate, on its own motion, or on complaint from any interested party, whether any rate, or regulation affecting rates, is unjust, unreasonable, or discriminatory. 16 U.S.C. § 824e(a) & (b). Section 306 of the Act gives any State, municipality, state commission, or person the right to file a complaint under Section 206 of the Act. *Id.* §§ 824d, 824e, 825e.

2. The Multi-State Entergy System. Petitioner ELI is part of the same "integrated power pool" involved in *MP&L*, 487 U.S. at 357.[2] ELI is an electric public utility operating in Louisiana, and ELI is a wholly owned subsidiary of Entergy Corporation, which is a public utility holding company under the Public Utility Holding Company Act, 15 U.S.C. §§ 79 *et seq.* There are now four other operating companies in the Entergy System: Entergy Arkansas, Inc. (formerly AP&L), Entergy Mississippi, Inc. (formerly MP&L), Entergy New Orleans, Inc. (formerly NOPSI), and Entergy Gulf States (formerly Gulf States Utilities, which merged with Entergy in 1994).

"The five [Entergy] operating companies plan, construct, and operate their collective electric generating and transmission facilities as a single, integrated system serving parts of Louisiana, Arkansas, Mississippi, and Texas." Pet. App. 3a. Each Entergy operating company separately owns some generating facilities.[3] However, all the generators on

[2] Entergy Corporation was formerly Middle South Utilities, Inc. Pet. App. 4a n.3.

[3] The Entergy System Operating Committee determines when generating facilities or capacity are added to the system, what types of facilities are added, and which Entergy company constructs or otherwise obtains the new capacity. J.A. 14-15. The determinations are made to meet the demand of the Entergy system as a whole. *MP&L*, 487 U.S. at 357. To meet growing system demand, new generating facilities historically were added by individual operating companies on a rotating basis prior to the construction of a major nuclear unit (Grand Gulf) in the

the system are centrally dispatched as part of a single integrated power pool, and their output is used to meet the combined load of the entire system. *MP&L*, 487 U.S. at 357.

"The costs and benefits of the coordinated operation of this interstate system" have been "distributed among the operating companies pursuant to" a series of power pool agreements known as the System Agreements. Pet. App. 3a. The current System Agreement, as adopted in 1982 and subsequently amended, governs arrangements among the operating companies for the transmission, sale, and exchange of electricity.[4] The System Agreement is a rate schedule filed with and approved by FERC, and any changes to a Agreement must be approved by FERC. See *MP&L*, 487 U.S. at 357; *Louisiana Pub. Serv. Comm'n* v. *FERC*, 174 F.3d 218, 220-21 (D.C. Cir. 1999) ("*LPSC*").

The System Agreement is administered by the Entergy Operating Committee. The Operating Committee includes one representative designated by each Entergy operating company and one from Entergy Services, a wholly-owned subsidiary of Entergy that provides administrative services to the system. J.A. 12. The Operating Committee's centralized planning and administration of the system achieves "efficiency, reliability and other economies of scale" and "benefit[s] all the . . . companies by having lower costs and greater reliability." *Middle S. Servs., Inc.*, 30 FERC ¶ 63,030, at 65,142, *aff'd as modified*, 31 FERC ¶ 61,305 (1985).

1980s. Because the operating company could not finance this plant, Entergy formed a separate generating subsidiary to build Grand Gulf, but each Entergy operating company was allocated a fixed percentage of the output of Grand Gulf and required to purchase its share of the output at rates that recover 100% of the Grand Gulf costs as calculated by the System pursuant to a formula rate. *See MP&L*, 487 U.S. at 358, 360.

[4] The original system Agreement was filed with FERC in 1951. *See MP&L*, 487 U.S. at 357. A significantly revised System Agreement was filed and made effective in 1973. *See Middle S. Servs.*, 16 FERC ¶ 61,101, at 61,216.

3. Equalization Payments And MSS-1. One of the purposes of the System Agreement is rough equalization of generating costs among the Entergy operating companies. The Agreement "'provide[s] the contractual basis . . . for equalizing among the companies any imbalance of costs associated with the construction, ownership, and operation of such facilities as are used for the mutual benefit of all the [operating companies].'" Pet. App. 3a-4a. In particular, the System Agreement includes a series of Service Schedules that allocate the costs of generating power and other system resources among the five Entergy Operating Companies.

The service schedule at issue here is Service Schedule MSS-1, Reserve Equalization,[5] which allocates the costs of reserve generators on the System. Under MSS-1, each operating company bears financial responsibility for a share of the System's generating capability. That share is a function of the company's contribution to the System's peak load. Companies providing less generating capacity than their calculated share of the System's capability ("short" companies) are required to make monthly "equalization" payments to companies providing more than their share ("long" companies). Pet. App. 5a.

Under MSS-1, the System makes monthly determinations of whether and to what extent individual operating companies are short or long under criteria set forth in the tariff. The System then calculates and assesses the particular equalization payment that short companies must make to long companies – pursuant to the rate formula set forth in MSS-1. Through these payments, short Entergy companies compensate long companies for reserve capacity that the long

[5] "MSS" refers to the former name of the System's service company, Middle South Services, Inc. The number "1" indicates only that this is one of several Service Schedules. Pet. App. 4a n.3.

companies will "make . . . available to its sister companies" when needed. *LPSC*, 174 F.3d at 220.[6]

FERC has approved the formula rate established in MSS-1 and the other service schedules in a series of separate orders.[7] In these Orders, FERC rejected the LPSC's contention that approval of the formula tariff in MSS-1 should be conditioned on periodic filings by Entergy, and periodic review by FERC, of the specific costs and other inputs that the System plugs into the formula. FERC reasoned that the equalization payments allocate costs among affiliated companies that participate in a single integrated power pool, that the specific costs and other determinations that the System makes in administering these schedules are disclosed in retail and wholesale rate proceedings, and that inclusion of "any questionable costs" could be remedied in a complaint proceeding under Section 206 of the Federal Power Act.[8]

4. The Extended Reserve Shutdown Program. Under Section 10.02 of the System Agreement, the System

[6] For example, in the 1996 test year, ELI was required to make MSS-1 equalization payments to two companies (Entergy Arkansas, Inc. ("EAI") and Entergy Mississippi, Inc. ("EMI")). For the period January through June, ELI was required to pay EAI $1.6616 per kilowatt ("kW") month (for the kWs that EAI contributes to ELI) and EMI $1.6616 per kW month (for the kWs that EMI contributes to ELI). For the period July through December, ELI was required to pay EAI $1.1943 per kW month and EMI $1.9074 per kW month. Total ELI MSS-1 payments in calendar year 1996 were $14,451,982.

[7] *Middle S. Servs.*, 30 FERC ¶ 63,030, at 65,131-32, 65,135-40 (1982 Service Schedules); *Middle S. Servs.*, 16 FERC ¶ 61,101, at 61,219 (1973 Service Schedule Amendment); *see Entergy Services, Inc. (Opinion No. 415)*, 80 FERC ¶ 61,197 (1997) (Pet. App. 85a-106a), *aff'd*, *LPSC*, 174 F.3d at 231.

[8] *Middle S. Servs.*, 30 FERC ¶ 63,030, at 65,131; *see also Middle S. Servs.*, 16 FERC ¶ 61,101, at 61,219 ("[t]he costs which are distributed to the operating companies under the formulae will be subject to audit by the Commission, as well as investigations which might be commenced under Section 206 of the Federal Power Act").

Operating Committee must designate a generating unit as "available" for use by the Entergy System for that unit to be counted in an operating company's generating capability for purposes of the calculation of MSS-1 payments or receipts. J.A. 16-17.

During the mid-1980s, the Entergy operating companies had excess generating capacity. Rather than keep excess generating facilities on line, the companies placed them in an Extended Reserve Shutdown ("ERS") program "to save money (for the customers, as well as for the companies themselves)." Pet. App. 6a. By keeping 23 units in ERS status, Entergy retained the capability to activate the units to meet any future increase in power demand or operational deficiencies, while simultaneously "reduc[ing] operating staff and maintenance costs and defer[ring] costs of repairing the units." *Id.*

When it instituted the ERS program, the Entergy Operating Committee decided that ERS units would continue to be included in calculating individual operating companies' capacity and payments under MSS-1. This policy meant that inclusion of units in the ERS program had no immediate effect on the level of equalization payments required by Entergy operating companies that were "short" or on the level of receipts of companies that were "long." However, Entergy Arkansas and Entergy New Orleans "placed a proportionately larger share of their capacity in ERS" than had ELI (a short company) and Entergy Mississippi (a long company). Pet. App. 92a n.14. In consequence, the inclusion of ERS units in MSS-1 capacity determinations meant that ELI was "more short" and required to make higher MSS-1 equalization payments than would have been made if none of the ERS units had been reflected in the MSS-1 computation. *Id.* at 9a, 6a. (It also meant that Entergy Mississippi was "less long" and received lower payments than if ERS units had been excluded.)

5. FERC's Opinion. Between 1986 and 1993, neither the LPSC nor any other party contended that Entergy's treatment of ERS units violated MSS-1. However, in 1993, FERC noted this issue during its proceedings on the merger of Entergy and Gulf States Utilities, and FERC initiated proceedings to determine whether Entergy had violated the Agreement by including the ERS units in the MSS-1 computations. The LPSC intervened, and filed a separate complaint alleging that Entergy had violated the System Agreement by treating the ERS units as "available" capacity and seeking retroactive refunds (plus accrued interest) for ELI's retail customers.

In Opinion No. 415, FERC concluded that the ERS units were not "available" as that term was then used in Section 10.02 of the System Agreement,[9] and that Entergy's tariff did not "expressly encompass the ERS program." Pet. App. 104a. It held that Entergy's inclusion of the ERS units in MSS-1 calculations thus violated the terms of the System Agreement. *Id.* at 99a-100a; see *id.* at 123a-125a.

At the same time, FERC found that the "equities" did not support LPSC's request for a refund. The primary basis for this decision was FERC's finding that the "end result" of the inclusion of ERS units were MSS-1 rates that were "just, reasonable, and non-discriminatory." Pet. App. 161a.

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[9] Prior to August 5, 1997, Section 10.02 of the System Agreement provided in pertinent part:

> A unit is considered available to the extent the capability can be demonstrated and (1) is under the control of the System Operator, or (2) is down for maintenance or nuclear refueling. A unit is considered unavailable if in the judgment of the Operating Committee it is of insufficient value in supplying system loads because of (1) obsolescence, (2) physical condition, (3) reliability, (4) operating cost, (5) start-up time required, or (6) lack of due diligence in effecting repairs or nuclear refueling in the event of a scheduled or unscheduled outage. [Pet. App. 112a.]

Foremost, FERC found that an operating company's recovery of the costs of its ERS units from its sister operating companies was just and reasonable. It concluded that the "ERS units were planned and constructed for the benefit of all the pre-merger Operating Companies," Pet. App. 102a, and that even during the time the units are in ERS status, they provide system-wide benefits. In particular, the fact that the units could be brought back to service allows the System to "postpone construction and acquisition of new [generating] facilities to meet [projected] load growth." *Id.* at 163a n.8. It also means that "'[o]perational deficits [can] be made up'" by returning units to service as well as by "'short-term purchases'" or other "'operational action[].'" *Id.* at 105a. The benefits to the System are further magnified when units are in fact later returned to service (which occurs whenever that is the method of meeting growth or operational deficiencies that has the lowest incremental cost). *Id.* The D.C. Circuit later held that FERC's findings of these benefits were abundantly supported by substantial evidence in the record and by legal precedent. See *LPSC*, 174 F.3d at 228-29 (Silberman, J).

FERC further found that the ERS program produced other immediate cost savings for the operating companies, their ratepayers, and the System as a whole because placing a unit in ERS eliminates the operational costs of keeping units on line and allows deferral of repairs and maintenance. FERC thus also rested its decision upholding the reasonableness of the inclusion of ERS units in the MSS-1 calculations on the ground that operating companies otherwise would have a "disincentive" to place units in ERS and to achieve these benefits for the System. Pet. App. 101a. In particular, it found that operating companies would be less likely to include units in ERS if the effect would be to increase their required equalization payments (in the case of short companies) or to decrease their equalization revenues (in case of long companies):

> By including ERS units in the Schedule MSS-1 computation, Entergy continued the previously-approved equalization approach that was established for excess capacity on the Entergy System. Moreover, if Entergy had not undertaken to reduce costs for its system by implementing the ERS program, these units would have been eligible for inclusion in Schedule MSS-1. *We do not believe that the Operating Companies should lose the right to have their costs equalized when they take advantage of the ERS program which, we note, provides very significant benefits for the Entergy system.* [Pet. App. 102a-103a (emphasis supplied) (footnotes omitted).]

The D.C. Circuit held that this finding, too, was supported by substantial evidence and reasonable. See *LPSC*, 174 F.3d at 225-27.

FERC also relied on purely equitable factors. It noted that "Entergy as a whole received no net gain from the inclusion of ERS units in Schedule MSS-1," for the "overpayments were merely part of equalization payments among ratepayers which algebraically added up to zero as far as Entergy as a whole and its shareholders are concerned." Pet. App. 101a & n.37. While FERC acknowledged that net retail revenues could have been affected if Entergy had pursued a selective policy of "avoiding [retail] rate cases," it found that there was no evidence that Entergy companies had done so and that cost reductions from ERS had enabled Entergy "to avoid *rate increase* filings." *Id.* at 162a. The D.C. Circuit found that this reasoning "just passes muster." *LPSC*, 174 F.3d at 230.

Finally, FERC referred to the fact that no state commission had challenged the inclusion of ERS units during the seven years before FERC raised the issue. The D.C. Circuit stated that while this factor is "less weighty than the others – particularly the first two – and perhaps would be inadequate standing alone, we do not regard it as objectionable." *Id.*

FERC thus chose to remedy the past violation of the tariff by accepting Entergy's Offer of Settlement in which MSS-1 would be prospectively amended, effective August 5, 1997, so that it would expressly authorize the inclusion of the ERS units in MSS-1 calculations. Pet. App. 103a-105a. This amendment expressly authorized the Entergy Operating Committee to consider ERS units "available" in MSS-1 calculations if the "'intent of [the Operating Committee is to] return[] the unit to service at a future date in order to meet Entergy System requirements.'" *Id.* at 104a (emphasis omitted). See also *id.* at 157a-158a. The amendment further provides:

> "The Operating Committee's decision to consider an ERS unit to be available to meet future System requirements shall be evidenced in the minutes of the Operating Committee and shall be based on consideration of current and future resource needs, the projected length of time the unit would be in ERS status, the projected cost of maintaining such unit, and the projected cost of returning the unit to service." [*Id.* at 104a (emphasis omitted)].

FERC rejected the LPSC's claim that this language is "ambiguous and does not limit Entergy's judgment to make decisions on ERS units." Pet. App. 104a. It held that the proceeding arose "because of the failure of section 10.02 of the System Agreement to expressly encompass the ERS program. The proposed amendment does so." *Id.* It further held that the "'amendment sets out the parameters of the Operating Committee's discretion,'" and "'[t]he regulations of the Commission provide a remedy for any abuse of this discretion.'" *Id.* at 104a (quoting *Entergy Servs., Inc.*, 70 FERC ¶ 63,018 (1995)).

As noted, the LPSC appealed FERC's order to the Court of Appeals for the D.C. Circuit; and the LPSC challenged both FERC's denial of the refund and its prospective amendment

to the tariff. The D.C. Circuit rejected both contentions. See *LPSC*, 174 F.3d at 231.

First, the Court held that there is nothing in the Federal Power Act that requires FERC to order a refund of "overpayments" when a utility is found to have passed through costs that are not authorized by the governing FERC tariff; to the contrary, it may refuse to grant refunds when the costs benefitted ratepayers and otherwise were legitimate costs that the utility was entitled to recover from its customers. The Court relied on prior court of appeals' decisions that had so held.[10] As noted, the Court upheld FERC's discretionary decision to deny a refund because it accepted FERC's two separate findings that inclusion of ERS units benefits sister operating companies, their ratepayers, and the Entergy System and because it concluded that the two other "equitable" factors on which FERC relied were not impermissible considerations.

Second, the LPSC had challenged the prospective amendment to the System Agreement solely on the ground that it was too vague and gave the System Operating Committee "unfettered discretion." *Id.* at 231. The Court acknowledged the basis for the LPSC's contentions that the amendment lists factors that could "cut for or against . . . inclusion" of ERS units "depending on the circumstances" and does not "say anything about the relative weights of the factors." *Id.* The Court thus stated that the "amendment is certainly closer to a standard than to a rule," but it held that this is a matter of "rate design" and deferred to FERC's judgment that granting this discretionary authority to the System Operating Committee is "just and reasonable." *Id.* It stated that "FERC understandably concluded that the amendment set out the parameters of the operating

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[10] *See LPSC*, 174 F.3d at 224 (citing *Koch Gateway Pipeline Co.* v. *FERC*, 136 F.3d 810, 816 (D.C. Cir. 1998); *Town of Concord* v. *FERC*, 955 F.2d 67, 72-73 (D.C. Cir. 1992) (citing cases)).

committee's discretion, and that discriminatory implementation of the amendment could be remedied in a proceeding under FPA § 206." *Id.*

6. Entergy's Determination Under Amended Section 10.02. The Entergy Operating Committee met on September 30, 1997, less than two months after FERC had determined that MSS-1 rates were just and reasonable and nondiscriminatory when the 23 ERS units were treated as available. The minutes of the meeting quote the provisions of the amended tariff in full and state that the Committee concluded that the "units currently in ERS status" are "available" within the meaning of amended Section 10.02 J.A. 33-34. The minutes recite that these determinations were based on the information contained in a presentation that discussed the System's 1998 Capacity Plan and its 1998 Load and Capacity Forecast for the next ten years. *Id.*

The validity of these determinations was verified by subsequent events. It is undisputed that, consistent with the Operating Committee's assessment, "[b]y 1999, all of the ERS units, with the exception of one, had either been returned to active service, or w[ere] scheduled for return to service." Pet. App. 6a n.4.

7. The LPSC Order. On May 30, 1997, ELI made the annual filing of financial data (from a 1996 test year) that would be used to determine the retail rates that ELI would charge in Louisiana during the period from July 1, 1997 through June 30, 1998. In the resulting rate proceeding, the LPSC staff contended that the LPSC should exclude from ELI's retail revenues those costs of making equalization payments under MSS-1 that were attributable to the inclusion of ERS units in the rate calculation because these charges had been assessed in violation of the FERC tariff.

The LPSC concluded that it was obligated to permit recovery of the amounts incurred up to and including August 5, 1997, for it held that FERC Opinion No. 415 established

that ELI's payments were just and reasonable and "mandatory" during this period. But it concluded that it "has the authority to review the prudence of ELI's actions *after* August 5, 1997," Pet. App. 70a, and that a finding of imprudence after that date "could [not] conflict" with FERC's determinations in Opinion No. 415 because the Order did not mandate the inclusion of ERS units in the calculations after August 5, 1997. *Id.* at 72a.

In addressing the period from August 6, 1997 through July 30, 1998, the LPSC repeatedly acknowledged that it could not adjudicate the question whether the Operating Company or ELI had "violated a FERC-filed tariff" in continuing to treat ERS units as available after the amended tariff took effect. Pet. App. 64a. It thus held that it "is preempted from determining whether the terms of a FERC tariff have been met, for the issue of violation of or compliance with a FERC tariff is peculiarly within FERC's purview. *Any allegation of a violation of a FERC-tariff should therefore be brought before the FERC.*" *Id.* (emphasis supplied). See *id.* at 72a (the LPSC "is not assessing Entergy's compliance with the amended Section 10.02 of the System Agreement, for a determination of violation or compliance with a FERC tariff is peculiarly within FERC's purview").

The LPSC held that the question whether ELI was prudent in paying equalization assessments that reflected ERS units was a broad inquiry in which the LPSC could choose also to consider the criteria of the tariff in assessing the reasonableness of ELI's actions:

> In addition to the well-established standards for judging prudence such as reasonableness, economy, impact on retail rates, duty to minimize cost of service, duty to avoid risk, etc., this Commission can also take judicial notice of the FERC-set standard for treating ERS units as available. . . . Thus, the amended Section 10.02 may serve as an additional test for reasonableness and

prudence in this Commission's review of ELI's MSS-1 expenses. [Pet. App. 65a-66a.]

Assessing all these factors, the LPSC found that ELI's decision to make its assessed MSS-1 equalization payments "was neither prudent nor reasonable." Pet. App. 73a. The LPSC pointed out that "ELI was made aware by the FERC order of the increased costs to ELI and its ratepayers" of continuing to treat ERS units as available. *Id.* The LPSC then acknowledged that FERC had held that "'Entergy's actions resulted *in system-wide benefits, in the form of enhanced system efficiencies and cost reductions* that ultimately benefited ratepayers.'" *Id.* But the LPSC stated that its concern was the effect of MSS-1 payments on ELI's retail rates and that the cited system-wide benefits were simply evidence of ELI's imprudence:

> [t]hese findings [of system-wide benefits] . . . apply *at the level of the parent company*, whereas this Commission is concerned solely with ELI in this proceeding. FERC's jurisdiction under 16 U.S.C.A. §824 over interstate wholesale rates makes system-wide concerns relevant to FERC, whereas *in regulating retail rates, system-wide benefits are not of prime importance to a state Commission*. [*Id.* (first emphasis in original; second emphasis supplied).]

The LPSC further concluded that where "system-wide benefits increase ELI's operation expenses, it is a reflection of the utility's failure to exercise its discretion to limit expenses, and of its acquiescence in the parent company's decision without regard to the impact of such increased expenses on ELI's ratepayers." *Id.* at 73a-74a. It also found that "system-wide benefits which increase ELI's operation expenses show that other sister companies are benefiting from MSS-1 treatment of ERS units at ELI's expense." *Id.* at 51a-52a.

Finally, the LPSC also found that the Operating Committee's decision to continue to treat ERS units as

available was made without the benefit of more "detailed" and "accurate" information that "was not available to the Operating Committee at the time it made the decision under review." Pet. App. 74a. The LPSC did *not* find that the Operating Committee would have reached a different decision in any respect if it had considered additional information, much less that it would then have excluded all 23 ERS units from MSS-1 calculations. Although the LPSC acknowledged that the Operating Committee "made the decision," *id.*, the LPSC found that ELI was imprudent for failing to "follow the criteria set forth in the amended Section 10.02 in reaching a decision regarding the availability status of ERS units after August 5, 1997," *id.*, and that "[w]hen its obligation to make the higher MSS-1 payments ceased on August 5, 1997, ELI should have responded with a more thorough evaluation of that change in circumstances in an attempt to minimize its cost of service." *Id.* at 75a.

For all of these reasons, the LPSC concluded that ELI had acted imprudently. The critical premises of the LPSC's decision were its belief that no binding FERC order required ELI to comply with the System Operating Committee's application of MSS-1 and that ELI had a choice whether to comply with the Operating Committee's decision – *viz.*, that ELI's decision "was not mandated by FERC" and that "the utility had an opportunity to make a different decision and minimize its costs" and did not do so. Pet. App. 75a.

Relying on these premises, the LPSC held that the *Pike County* exception to the filed-rate doctrine applied here. Under that exception, a state may review the prudence of a utility's decision to purchase power at a FERC-approved rate if the utility has more than one source for obtaining wholesale power and has the right to refuse to purchase power under the terms of a FERC tariff. *MP&L*, 487 U.S. at 373-74; *Nantahala Power & Light Co.* v. *Thornburg*, 476 U.S. 953, 972 (1986) (discussing *Pike County Light & Power Co.* v. *Pennsylvania Public Utility Comm'n*, 465 A.2d 735, 737-38

(Pa. Commw. Ct. 1983)). The LPSC decided that ELI had the right to refuse to make equalization payments that reflected ERS units because the LPSC believed that neither the System Agreement, MSS-1, nor any FERC order required ELI to incur the costs imposed by the System Operating Committee under MSS-1.

The LPSC ordered ELI to remove from its calculations "all MSS-1 overpayments incurred on or after August 6, 1997" that resulted from the inclusion of the ERS units in the MSS-1 calculation. Pet. App. 83a. It further ordered ELI to credit the overpayments "back to the ratepayers." *Id.*

8. The Louisiana Courts' Decisions. ELI filed a petition for judicial review of the LPSC order on February 17, 1999. The district court, however, affirmed the order, stating that the ruling was "well within [the LPSC's] constitutional and statutory authority," and was neither arbitrary nor capricious. Pet. App. 22a. ELI appealed to the Louisiana Supreme Court.

In an opinion without citation to *MP&L*, the Louisiana Supreme Court (by a vote of 4-3) affirmed the district court's decision, and essentially adopted the analysis of the LPSC. It held that the LPSC had jurisdiction to review the prudence of ELI's decision to continue to treat ERS units as available under MSS-1 after August 5, 1997, and that ELI's decision had been imprudent and unreasonable. Like the LPSC, the Louisiana Supreme Court stated that FERC has exclusive jurisdiction to determine the lawfulness of the wholesale rates paid by ELI and to determine whether the 1982 System Agreement and Schedule MSS-1 had been violated. Pet. App. 14a. But the court nonetheless held that the LPSC had the authority to determine that it was imprudent for ELI to incur the costs prescribed in MSS-1 because "FERC never ruled on the issue of whether ELI's decision to continue to include the ERS units is a prudent one [or] whether ELI must continue to make overpayments to the other Entergy operating companies." *Id.* at 19a.

Like the LPSC, the Louisiana court decided that no FERC order required ELI to treat ERS units as available after August 5, 1997, and that ELI had the "option[]" of "treating the units as unavailable." Pet. App. 20a. Thus, the court held that under the rule established in *Pike County*, the LPSC had jurisdiction to address the prudence of ELI's choice. *Id.* at 15a-17a.

Finally, the Louisiana court held that the LPSC's determination that ELI had been imprudent was not arbitrary or capricious. Pet. App. 19a-20a. In so holding, the court relied on the LPSC's findings (a) that ELI had a choice whether to continue to treat ERS units as available under MSS-1 and made the choice that increased costs for Louisiana ratepayers, and (b) that the System Operating Committee did not "'exert due diligence'" in deciding to continue to treat ERS units as available under MSS-1. *Id.* at 20a.

Justices Kimball, Lobrano, and Traylor dissented. Justice Kimball's dissent pointed out that the majority had acknowledged that (i) the System Agreement is a FERC rate schedule, (ii) that FERC amended the System Agreement to state that ERS units may be included in calculations for MSS-1 payments if a specified condition is met, and (iii) that "FERC has exclusive jurisdiction over the issue of whether ELI has violated the System Agreement." Pet. App. 21a. She stated that the LPSC found ELI's decision to continue to include ERS units after August 5, 1997 imprudent, "because the LPSC found that ELI did not meet the conditions imposed in the amended System Agreement." *Id.* Thus, Justice Kimball concluded, "the LPSC is simply trying to do indirectly what it may not do directly, namely, determine that ELI violated a FERC tariff." *Id.*

SUMMARY OF ARGUMENT

The LPSC's Order epitomizes the retail ratemaking orders that the Federal Power Act was enacted to prevent. The

LPSC here barred ELI from recovering in its retail rates the costs of an interstate power system that were allocated to Louisiana under a FERC rate schedule; that concededly produced benefits for the entire multistate system; and that were expressly found by FERC to be "just, reasonable, and nondiscriminatory" prior to August 5, 1997. Yet the LPSC found that it was unreasonable for ELI to incur these costs after that date based on the LPSC's parochial local interest in reducing rates in Louisiana and preventing payments to out-of-state companies. The Louisiana Supreme Court has upheld this Order, because it concluded that states are free to disallow costs under FERC rate schedules unless and until FERC enters an order that finds them to be just and reasonable for the precise period in question and because it believed that the *Pike County* doctrine authorized the disallowance in question. These holdings are simply wrong.

The purpose of the Federal Power Act is to centralize all determinations of the reasonableness and "prudence" of bulk power supply arrangements in interstate systems in a neutral federal forum – FERC. This Court has developed the "'filed rate doctrine'" to "enforce" FERC's exclusive jurisdiction over these arrangements. *Nantahala*, 476 U.S. at 962-67. Under this doctrine, FERC alone may determine the reasonableness and prudence of an affiliated utility's compliance with a FERC tariff, and state commissions must treat the wholesale rates set under such tariffs as reasonable operating expenses and pass them through to retail customers unless and until FERC reviews the rates, finds them to be unjust and unreasonable, and prescribes different rates. *Id.*

In *Nantahala*, the Court held that state and local entities "setting retail prices must allow . . . costs incurred as a result of paying a FERC-determined wholesale price" to be recovered in retail rates. *Id.* at 965. *MP&L* reaffirmed that state and local regulators may not "enter an order 'trapping' the costs [that a utility] is mandated to pay" under a FERC

tariff or "undertake a 'prudence' review for the purpose of deciding whether to enter such an order." 487 U.S. at 372.

MP&L also expressly rejected the Louisiana Supreme Court's holding that the pre-emptive effect of FERC jurisdiction "turn[s] on whether a particular matter was actually determined in the FERC proceedings." *Id.* at 374. "The reasonableness of rates and agreements regulated by FERC may not be collaterally attacked in state or federal courts. The only appropriate forum for such a challenge is before the Commission or a court reviewing the Commission's order." *Id.* at 375.

The doctrine of *Pike County* is inapposite. It allows states to find that a utility was imprudent in obtaining a particular quantity of power at a FERC-approved price only when the utility "had the legal right to refuse to buy that power" and could have purchased it from another source at a lower price. *MP&L*, 487 U.S. at 374. The doctrine has no applicability where, as here, the claim is that a utility should have "minimize[d]" its costs under a FERC tariff to which it is legally bound. Pet. App. 75a. Further, ELI had no "choice" whether to include ERS units in the equalization payments it made. Under the FERC tariff, that determination was delegated to the System Operating Committee. ELI is bound by the Operating Committee's decisions and required to make whatever equalization payments flow from these decisions.

Finally, there is no substance to any claim that the Act gives state retail ratemaking bodies jurisdiction to adjudicate whether FERC tariffs have been "violated" and to order prudence disallowances as remedies for any "violations" that are found. These are matters exclusively for FERC. That is particularly so in the case of the tariff at issue here (MSS-1), for it delegates to the System Operating Committee the task of determining the generating facilities that are available under a discretionary standard. The Operating Committee's role under the tariff is a matter of its "rate design," and the determinations made by the Operation Company are part and

parcel of the filed rate and bind state commissions unless and until they are disallowed by FERC in proceedings under Section 206 of the Act. See *Nantahala*, 476 U.S. at 966-67 & 970-71 (1986); *AT&T* v. *Central Office Tel. Co.*, 524 U.S. 214, 224 (1998).

ARGUMENT

I. THE FEDERAL POWER ACT GIVES FERC EXCLUSIVE JURISDICTION TO REGULATE COST ALLOCATIONS WITHIN INTERSTATE POWER POOLS AND PRE-EMPTS STATES FROM LITIGATING THE PRUDENCE OF SUCH ALLOCATIONS IN RETAIL RATEMAKING PROCEEDINGS.

Congress enacted the Federal Power Act because it recognized that bulk power arrangements among utilities are "particularly likely to affect more than one State," and that "uncontrolled [state] regulation" of utilities in multi-state systems can "patently interfere with broader national interests." *Arkansas Elec. Coop. Corp.* v. *Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 377 (1983).[11] If state regulation had been permitted, the reasonableness of wholesale power

[11] The Federal Power Act was enacted to fill the "gap" created by the 1927 holding in *Attleboro* that the negative impact of the Commerce Clause barred state regulation of wholesale sales of electricity. *New York* v. *FERC*, 535 U.S. 1, 5 (2002) (citing *Public Util. Comm'n* v. *Attleboro Steam & Elec. Co.*, 273 U.S. 83, 89 (1927)). Congress could have filled the gap by authorizing state regulation, *see Prudential Ins. Co.* v. *Benjamin*, 328 U.S. 408, 427 (1946). Instead, Congress codified *Attleboro*'s concerns that parochial state regulation would burden interstate commerce and gave FERC jurisdiction over all wholesale power transactions. Congress not only "authorized federal regulation of electricity in areas beyond the reach of state power, such as the gap identified in *Attleboro*, . . . it also extended federal coverage to some areas that previously had been state regulated." *New York* v. *FERC*, 535 U.S. at 6.

rates and the interstate allocations of power costs could have been litigated in each affected state. *Id.* at 377-78. Further, each state has incentives to protect its "respective local interests," *Public Utilities Commission* v. *Attleboro Steam & Electric Co.*, 273 U.S. 83, 90 (1927), and to impose arrangements that "benefit[] its residents to the detriment of its neighbors." *Massachusetts, Dep't of Pub. Utils.* v. *United States*, 729 F.2d 886, 888 (1st Cir. 1984) (Breyer, J.). Thus, the result would have been wasteful duplicative proceedings and the inappropriate shifting or trapping of costs with attendant burdens on interstate commerce.

The Federal Power Act prevents this interference with commerce by centralizing all decisions about wholesale power arrangements in a single neutral federal forum – FERC – and by establishing a uniform, orderly procedure in which all legitimate state interests in such arrangements can be raised and protected. The Act requires each utility to file with FERC a "rate schedule" or tariff that generally contains the utility's charges for wholesale sales of electricity and all arrangements affecting these wholesale rates. Section 205 requires FERC to assure that these rates are "just and reasonable," and nondiscriminatory, and Section 206 of the Act authorizes FERC to investigate rates and practices on its own motion or on complaint. 16 U.S.C. §§ 824d(a)-(b), 824e(a).

Because FERC's determinations directly affect retail rates – *i.e.*, wholesale rates become costs for purposes of setting retail rates – the Act protects local interests by giving states, municipalities, and other retail rate-making bodies the right to participate in FERC proceedings, to file complaints with FERC, and otherwise to urge FERC to prevent the imposition of excessive or unwarranted costs on retail ratepayers. *Id.* §§ 824d, 824e, 825e. See also *Pennsylvania Water & Power Co.* v. *FPC*, 343 U.S. 414, 418 (1952) (the federal power agency must assure that wholesale power supply

arrangements do not result in "excessive prices" to any class of power consumers).

This Court has consistently construed the Federal Power Act to give FERC "jurisdiction plenary" to make all determinations required to regulate wholesale rates and to allocate costs among affiliated utilities, regardless of the "impact" on state regulation. See *FPC* v. *Southern Cal. Edison Co.*, 376 U.S. 205, 215-16 (1964); *Montana-Dakota Utils. Co.* v. *Northwestern Pub. Serv. Co.*, 341 U.S. 246, 251-52 (1951). Whatever the form of state action, it is pre-empted if its "effect" is to interfere with FERC's interstate "allocation of costs" among the companies of an integrated power system. *Maryland* v. *Louisiana*, 451 U.S. 725, 749-50 (1981) (pre-empting state tax law).[12]

Most pertinently, the Court developed the "filed-rate doctrine" to "enforce the exclusive jurisdiction vested by Congress in FERC." *Nantahala*, 476 U.S. at 966. Under this doctrine, interstate power rates that are "filed with FERC or fixed by FERC" must be treated as lawful in a state or federal proceeding unless and until they are changed by FERC, *id.* at 970, and no tribunal may enter an order that would have the effect of "authoriz[ing] commerce in the commodity on other terms." *Montana-Dakota Utils. Co.*, 341 U.S. at 251. This doctrine was first applied to federal court proceedings, *id.*, and was later extended to state court proceedings under state law and made a rule of federal pre-emption in *Arkansas Louisiana Gas Co.* v. *Hall*, 453 U.S. 571 (1981).

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[12] Contrary to the decision of the LPSC, Pet. App. 56a-62a, there is no presumption against pre-emption in this context. As this Court explained in *New York* v. *FERC*, 535 U.S. at 18, in cases addressing "the proper scope of federal power" delegated to an agency by Congress, the Court "interpret[s] the statute to determine whether Congress has given FERC the power to act as it has, and [does] so without any presumption one way or the other."

Thereafter, state supreme courts almost uniformly held that the filed rate doctrine requires that costs incurred under FERC rate schedules be treated as reasonable operating expenses and passed through to retail ratepayers in state retail ratemaking proceedings. See *Nantahala*, 476 U.S. at 967-70. These holdings were followed by this Court first in *Nantahala* and then in *MP&L*.

Nantahala held that state retail rate regulators may not disregard FERC's allocation of low-cost power among operating companies in an affiliated, multi-state system in setting retail rates. The allocation at issue was the result of a FERC proceeding that determined the reasonableness of the arrangements, a proceeding in which the state was fully involved. The allocation was also part and parcel of FERC's exclusive authority to determine wholesale rates, because it "determine[d] the amount of low-cost power that [Nantahala] may obtain," and because "FERC required Nantahala's wholesale rate to be filed in accordance with that allocation." 476 U.S. at 967. But the state attempted to use its retail ratemaking authority to nullify FERC's allocation decision by setting retail rates as if a radically different interstate allocation had been ordered, and this Court reversed. The Court explained:

> The filed rate doctrine ensures that sellers of wholesale power governed by FERC can recover the costs incurred by their payment of just and reasonable FERC-set rates. When FERC sets a rate between a seller of power and a wholesaler-as-buyer, a State may not exercise its undoubted jurisdiction over retail sales to prevent the wholesaler-as-seller from recovering the costs of paying the FERC-approved rate. *Such a "trapping" of costs is prohibited.* Here, [the wholesaler as seller] cannot fully recover its costs of purchasing at the FERC-approved rate if [the state commission's] order is allowed to stand. [*Id.* at 970 (emphasis supplied) (citation omitted).]

Thus, the Court held, rate schedules "filed with FERC or fixed by FERC must be given binding effect by state utility commissions determining intrastate rates." *Id.* at 962.

MP&L applied these principles to interstate power and cost allocations within the Entergy System (then called the Middle South System). The Mississippi Supreme Court had held that its state commission could not pass through to consumers the costs of the Grand Gulf I nuclear plant that were allocated to MP&L by the FERC rate schedules unless the state commission first determined that these costs were "prudent." In particular, the Mississippi court held that the state utility commission was required to examine the prudence of the management decisions that led Middle South Utilities to construct Grand Gulf 1. The Mississippi court stated that it had become "obvious" by the early 1980's, that "both the cost and demand projections related to Grand Gulf were terribly incorrect," and it therefore ordered the state commission to conduct a prudence "review" to determine whether the system "acted reasonably when [it] constructed Grand Gulf 1, in light of the change in demand for electric power . . . and the sudden escalation of costs." *State ex rel. Pittman* v. *Mississippi Pub. Serv. Comm'n*, 506 So. 2d 978, 986, 987 (Miss. 1987) (en banc); *MP&L*, 487 U.S. at 368.

This review would have decided the extent to which MP&L had been imprudent with respect to Grand Gulf expenditures and thus the extent to which Grand Gulf costs should be "'trapped'" and borne by the utility's shareholders, rather than "passed on to MP&L's retail customers." *MP&L*, 487 U.S. at 372 n.12. The state court also held that "[a]s to those matters not resolved by the FERC, State regulation is *not preempted provided that* State regulation would not contradict or undermine FERC determinations and federal interests, or impose inconsistent obligations on the utility companies involved." *Pittman*, 506 So. 2d at 986.

MP&L, however, held that the state court's judgment was pre-empted by federal law. It reaffirmed this Court's earlier

decision in *Nantahala*, explaining that the Federal Power Act and the Supremacy Clause "preclude [such a] review of MP&L's managerial prudence." 487 U.S. at 369. The Court further held that a state retail ratemaking body "may not enter an order 'trapping' the costs MP&L [and other system operating companies are] mandated to pay under the FERC order allocating Grand Gulf power or undertake a 'prudence' review for the purpose of deciding whether to enter such an order." *Id.* at 372 & n.12. "States may not alter FERC-ordered allocations of power by substituting their own determinations of what would be just and fair." *Id.* at 371. See also *Nantahala*, 476 U.S. at 970.

In *MP&L*, this Court made explicit that FERC had exclusive jurisdiction to determine the prudence of decisions of MP&L and other system operating companies related to wholesale power arrangements. All such "prudence" claims, the Court said, were matters "FERC easily could have considered in determining whether to permit [the system] to recoup 100% of the costs of Grand Gulf in the wholesale rates it charged to the four operating companies and in allocating Grand Gulf Power" among those companies. 487 U.S. at 375. The Court expressly rejected the argument that state commissions have the authority to bar recovery of FERC-mandated wholesale costs on grounds that could have been raised before FERC. *Id.* The Court held: "The reasonableness of rates and agreements regulated by FERC may not be collaterally attacked in state or federal courts. The only appropriate forum for such a challenge is before the Commission or a court reviewing the Commission's order." *Id.*

II. THE LPSC'S ORDER VIOLATES *NANTAHALA*, *MP&L*, AND THEIR PRECURSORS.

Under these principles, the Louisiana Supreme Court was wrong in holding that the LPSC had jurisdiction to decide that "ELI's failure to take steps to minimize its MSS-1 payments after the [August 5, 1997] effective date of the amendment to

Section 10.02 of the System Agreement" was imprudent. Pet. App. 19a. Schedule MSS-1 is a tariff "fixed by" and "filed with" FERC that sets forth the standards and formulas that the System Operating Committee applies in allocating the costs of generating power among members of an integrated, interstate power pool. The System Agreement mandates that each Entergy Operating Company pay the equalization charges that the System assesses under the tariffs, subject to review only in a complaint or other proceeding before FERC under Section 206 of the Act. Under *Nantahala* and *MP&L*, the LPSC must accept ELI's costs under MSS-1 for purposes of setting ELI's retail rates unless and until FERC says otherwise.

Instead, the LPSC disallowed a portion of the ELI equalization payments and refused to pass them through to Louisiana ratepayers. The LPSC thus did precisely what *Nantahala* and *MP&L* prohibit: it "trapped" costs that were required to be incurred under a FERC rate schedule.

The primary ground for the Louisiana Supreme Court's judgment is its view that the Federal Power Act pre-empts states from litigating only those matters that have actually been determined by FERC and that FERC Order No. 415 did not foreclose the LPSC from finding the ERS-related portion of ELI's equalization payments to be imprudent on the grounds that the LPSC advanced. The Louisiana Supreme Court also relies on the *Pike County* doctrine. Finally, the LPSC's counsel has made the *post hoc* claim (rejected by the LPSC's Order) that the LPSC has "concurrent jurisdiction" to find violations of FERC tariffs and to fashion appropriate remedies. None of these claims has merit.

The overriding fact is that FERC has exclusive jurisdiction over the transactions among affiliated utilities operating an interstate power pool and over all the complex interrelated questions that these arrangements present. "[W]hether one characterizes the questions as related to prudence, interpretation [of the basic service agreements], or cost

allocation, they are clearly matters most appropriately resolved by [FERC] as part of its overriding authority to evaluate and implement all applicable wholesale rate schedules." *MP&L*, 487 U.S. at 378 (Scalia, J., concurring in the judgment) (first alteration in original) (quoting *AEP Generating Co.*, 36 FERC ¶ 61,226, at 61,550 (1986)).

A. Pre-emption Is Not Limited To Matters "Actually Determined" In Prior FERC Orders, But Extends To Any Claim That Could Have Been Raised At FERC.

The major premise of the Louisiana Supreme Court's holding is that FERC Order No. 415 "did not consider whether the Operating Committee's decision to use the ERS units in its calculation after August 5, 1997 is in compliance with the System Agreement" and that the LPSC therefore had the authority to "assess the prudence of ELI's decision [sic] to continue to accord MSS-1 treatment to ERS units." Pet. App. 15a. This is incorrect. The Federal Power Act's pre-emption of state regulation in no way depends on whether the particular matter has been addressed in prior FERC Orders.

This Court expressly so held in *MP&L*. It rejected the Mississippi court's holding that "the preemptive effect of FERC jurisdiction turned on whether a particular matter was actually determined in the FERC proceedings." 487 U.S. at 374 (citing *Pittman*, 506 So. 2d at 986). The Court explained that it has "long rejected this sort of case-by-case analysis of the impact of state regulation upon the national interest in power regulation cases." *Id.* (internal quotation marks omitted) (quoting *Nantahala*, 476 U.S. at 966). It held that "States may not regulate in *areas* where FERC has properly exercised its jurisdiction," *id.* (emphasis supplied), and that "[t]he reasonableness of rates and agreements regulated by FERC may not be collaterally attacked in state or federal courts" or in State commissions. *Id.* at 375. "The only appropriate forum for such a challenge is before the

Commission or a court reviewing the Commission's order." *Id.*

Similarly here, FERC has properly exercised its jurisdiction over the allocation of costs of ERS and other generating units. Indeed, FERC Order No. 415 held that the recovery of these costs from Louisiana ratepayers was just and reasonable during the past periods when the charges were not authorized by the governing tariff, and FERC attempted to "prevent future disputes" by amending MSS-1 so that it expressly authorized these charges after August 5, 1997. See Pet. App. 103a-104a. If the LPSC believed that Operating Committee's decision to include ERS units in MSS-1 payments after August 5, 1997 violated this tariff and that ELI should not then have made payments that reflect ERS units, the LPSC's exclusive remedy was to file a complaint before FERC. The LPSC's refusal to do so cannot deprive FERC of exclusive jurisdiction. The LPSC simply "cannot evaluate . . . the prudence of [the] decision to [include ERS costs in MSS-1 payment calculations] without traversing matters squarely within FERC's jurisdiction." *MP&L*, 487 U.S. at 376.

B. The LPSC's Order Conflicts With FERC's Policies And Its Explicit Findings In FERC Order No. 415.

Further, the LPSC's Order vividly underscores the threat to FERC's regulation if state commissions are permitted to exercise jurisdiction over the reasonableness of interstate power supply arrangements whenever FERC purportedly has not "actually" addressed the particular subject matter at issue. Here, FERC had found that it was just, reasonable, and nondiscriminatory for the 23 ERS units to be included in calculations of equalization payments during the period that ended on August 5, 1997. The LPSC reached the opposite conclusion for the immediately ensuing period of August 6, 1997 to June 30, 1998. It did not do so because the LPSC found any material intervening changes in conditions. Rather, the LPSC relied on local interests that are impermissible

considerations under FERC policies and treated the "system-wide benefits" on which FERC relied as not merely irrelevant, but as evidence of imprudence. Pet. App. 73a-74a.

In particular, FERC Order No. 415 held that inclusion of the 23 ERS units in the equalization rates ELI paid was just, reasonable, and nondiscriminatory because of the substantial benefits that ERS units produced for the entire Entergy system, including Louisiana and its ratepayers. See *supra* at 10-12. It explained that the units were built to meet the needs of the system as a whole and that when they are in extended reserve status, the units function as reserves that eliminate the need for the system to invest in additional generation capacity. Pet. App. 102a, 163a n.8. It noted that the ERS units further provide even greater benefits if they are later reactivated – as they have been – to meet load growth and operational deficiencies. *Id.* at 105a. FERC further explained that a rule that excluded ERS units from equalization payment calculations would inhibit conduct that produces other immediate savings and efficiencies for the system and ratepayers. *Id.* at 102a-103a. These are the reasons that FERC refused to order refunds for the prior technical violation of the tariff and that it amended the tariff to expressly authorize the inclusion of ERS units in MSS-1 calculations after August 5, 1997.

To be sure, FERC did not expressly address the reasonableness of the continued inclusion of the 23 ERS units after that date. However, the LPSC did not find that there was any material change in conditions in the days and months following August 5, 1997. Indeed, while it criticized the System Operating Committee for failing to rely on more "accurate" and "detailed" information that became available only after the September 1997 meeting in which the availability determination was made, the LPSC does not find that consideration of this other information would have altered the Operating Committee's ultimate conclusion that all ERS units should be considered "available" under MSS-1

calculations, much less that it would resulted in the exclusion of all 23 ERS units. See Pet. App. 74a. Any such finding would have been impossible, moreover, in view of the conceded fact that all but one of units were returned to service, or scheduled to return to service, within the next two years. *Id.* at 6a n.4.

To the contrary, the LPSC Order affirmatively *acknowledged* the continued validity of FERC's findings that ERS units benefit the system in the form of "'enhanced system efficiencies and cost reductions that ultimately benefited ratepayers.'" Pet. App. 51a (emphasis omitted). The LPSC expressly based its disallowance of all costs resulting from the inclusion of any ERS units on the ground that its "primary concern" was not the existence of the conceded "system-wide benefits," but the local and parochial concerns of reducing retail rates in Louisiana and in preventing Louisiana customers from paying for generating capacity owned by sister utilities. *Id.* at 73a ("this Commission is concerned solely with ELI in this proceeding"); *id.* at 74a ("[t]he impact of MSS-1 expenses on retail rates guides this Commission's review of ELI's actions"); *id.* at 73a ("system-wide concerns [are] relevant to FERC, whereas in regulating retail rates, system-wide benefits are not of prime importance to this Commission"); *id.* at 51a-52a ("other sister companies are benefiting from the MSS-1 treatment of ERS units at ELI's expense"). Perversely, the LPSC treated the existence of system-wide benefits as evidence of ELI's imprudence. See *id.* at 73a ("where those system-wide benefits increase ELI's operational expense, it is a reflection of the utility's failure to exercise its discretion to limit expenses").

Although it nominally covers a different period, the LPSC's Order quite plainly conflicts with FERC Order No. 415. Here, as in *MP&L*, the LPSC violated FERC's policies by making prudence decisions "'in light of local conditions' alone" and by seeking to subvert arrangements that benefit

the Entergy System as a whole. See *MP&L*, 487 U.S. at 376. As in *MP&L*, the LPSC's actions underscore the threat to interstate commerce that local regulation creates and the need for the "bright line" rule that categorically bars states from regulating the prudence of a utility's actions under a FERC tariff.

C. *Pike County* Is Inapposite.

Contrary to the Louisiana Supreme Court's holding, the *Pike County* exception to the filed rate doctrine is inapplicable here. Pet. App. 15a-17a (citing *Pike County*, 465 A.2d at 738). While this Court has not approved the *Pike County* doctrine, the Court has held that it can allow state commissions to find that a utility was imprudent in obtaining a particular quantity of power at a FERC-regulated rate only if the utility clearly had "the legal right to refuse to buy that power" and could have obtained the same quantity at a lower price from another source. *MP&L*, 487 U.S. at 374; *Nantahala*, 476 U.S. at 972-73. In this circumstance, a state commission's review of the prudence of the utility's choice between two options does not inherently implicate any FERC tariff or FERC's regulation of cost allocations within an interstate power system.

Here, by contrast, ELI's wholesale power arrangements are governed in their entirety by a FERC-approved tariff. And the claim of imprudence is solely that ELI should have acted to minimize its expenses under a FERC tariff that mandates equalization payments to allocate costs within an interstate power pool. *Pike County* has no possible valid application in this circumstance, for any prudence review necessarily requires states to determine matters within FERC's exclusive jurisdiction.

Further, even if *Pike County* applied to claims that a utility should have minimized its costs under a single FERC tariff, the doctrine cannot apply unless the utility had some choice or some control over the levels of its assessments. Here, ELI

had no choice whether to incur the ERS costs imposed under MSS-1. MSS-1 delegates to the System Operating Committee the decision whether ERS units are "available" for purposes of calculating operating companies' equalization rates under MSS-1 (Service Agreement Section 10.02 (J.A. 30-31)), and the decision of the Operating Committee (and the equalization charges that are assessed by the System) bind each Entergy Operating Company unless and until FERC rules otherwise. As *MP&L* and *Nantahala* make clear, and lower courts have held, *Pike County* has no application in these circumstances.[13]

In support of its reading of *Pike County*, the Louisiana Supreme Court also relied on *New Orleans Public Service, Inc.* v. *Council of City of New Orleans*, 911 F.2d 993 (5th Cir. 1990) ("*NOPSI*"), *cert. dismissed*, 502 U.S. 937 (1991). There, the Fifth Circuit upheld a retail ratemaking order that disallowed – and trapped – the same costs that were at issue in *MP&L*. This Court granted certiorari to review the decision, but the case was settled and dismissed before the Court could decide it. But even by its own terms, *NOPSI* provides no support for the LPSC's Order. The Fifth Circuit recognized that state commissions may not trap costs incurred under FERC schedules based on claims of imprudence that could be raised before FERC, see *id.* at 1001; and it upheld the prudence disallowance at issue only because it concluded

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[13] *Accord, Appalachian Power Co.* v. *Public Serv. Comm'n*, 812 F.2d 898 (4th Cir. 1987) (holding that the essence of the *Pike County* exception is choice and therefore that the prudence inquiry that the state commission sought to undertake was an impermissible duplication of the inquiry into the justness and reasonableness of the allocation agreement that was subject to the exclusive jurisdiction of FERC). *See also Public Serv. Co.* v. *Patch*, 167 F.3d 15, 27 (1st Cir. 1998); *Transmission Agency* v. *Sierra Pac. Power Co.*, 295 F.3d 918, 930 (9th Cir. 2002); *Middle S. Energy, Inc.* v. *Arkansas Pub. Serv. Comm'n*, 772 F.2d 404, 415 (8th Cir. 1985); *South Dakota Pub. Utils. Comm'n* v. *FERC*, 690 F.2d 674, 676 (8th Cir. 1982) (per curiam); *Anaheim, Cal.* v. *FERC*, 669 F.2d 799, 809-10 (D.C. Cir. 1981).

(erroneously) that FERC's jurisdiction does not extend to certain decisions made during construction of a plant. *Id.* at 1002. For present purposes, the decisive fact is that it is undisputed that FERC has jurisdiction over the prudence of the inclusion of ERS units in MSS-1 calculations. So *NOPSI* provides no support for any claim that the the LPSC's Order is within the scope of *Pike County* or is sustainable under any theory. In all events, *Nantahala* and *MP&L* foreclose any such claim.

D. The *Post Hoc* Claim That State Commissions Have Concurrent Jurisdiction To Adjudicate Whether Entergy Has Violated The System Agreement Is Erroneous And Irrelevant.

Both the LPSC's Order and the Louisiana Supreme Court's Opinion concluded that "FERC has exclusive jurisdiction over the issue of whether the System Agreement has been violated." Pet. App. 64a, 72a, 14a-15a. Each, of course, nonetheless asserted that it could address the prudence of ELI's continued compliance with MSS-1. *Id.* at 65a, 14a-15a, 19a. As the dissenting Justice explained below, this latter claim amounts to an illicit attempt by the LPSC to do indirectly what it cannot do directly, and it is erroneous for all of the reasons stated above. *Id.* at 21a. Perhaps in recognition of this reality, the LPSC's Opposition to the Petition for Certiorari sought to defend the judgment below on a different *post hoc* ground. It asserted that the LPSC and FERC have concurrent jurisdiction over the question whether Entergy has "violated" its tariff and that when the LPSC finds such a violation, it can impose a remedy that excludes from ELI's retail rates any expenses resulting from the purported tariff violation.

This argument is meritless. First, it ignores the Court's repeated holdings that the Federal Power Act adopts a "bright line" division between federal and state jurisdiction. See *supra* at 22-24. The question whether a FERC tariff has been violated is obviously on the federal side of the "bright line."

Further, while a state commission has jurisdiction over the Entergy Operating Company that provides retail electric services, it has no jurisdiction over Entergy and the System Operating Committee that administers the FERC tariff, which is an obvious precondition to adjudicating claims that they violated a FERC tariff.[14]

Second, LPSC's *post hoc* claim is irrelevant as well as erroneous. Even if the Act gave state commissions jurisdiction to adjudicate whether wholesale tariffs had been violated in retail rate proceedings, it would afford no basis for upholding the judgment of the Louisiana Supreme Court. As courts of appeals have uniformly held, when a FERC tariff is violated, the question of the remedial consequences of the violation are committed to FERC's discretion. See *Town of Concord* v. *FERC*, 955 F.2d 67, 72-73 (D.C. Cir. 1992) (citing cases). In particular, FERC has the discretion to refuse to grant a refund (that would be flowed through to retail ratepayers) on the ground that the charges represent legitimate costs that are appropriately charged to customers in that state and that the rates were just, reasonable, and nondiscriminatory, notwithstanding any technical violation of the tariff. *Id.* Indeed, in FERC Order No. 415, it made precisely this choice in the earlier proceedings where MSS-1 was at issue. See *supra* at 9-10. Thus, even if the Act granted state commissions concurrent jurisdiction to

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[14] The LPSC's reliance on *Pan American Petroleum Corp.* v. *Superior Court*, 366 U.S. 656 (1961), is misplaced. First, that case involves a breach of contract dispute between two parties engaged in a transaction that was governed by a tariff in whole or in part. It does not involve a state regulator arrogating to itself the right to decide whether a FERC tariff has been violated in determining retail rates for state consumers. Second, in that case, the Court held only that the existence of a federal preemption defense did not mean that a well-pleaded state law breach of contract claim cannot be brought in state court. The Court said nothing about the pre-emption claim on its merits. *See id.* at 664 ("[w]e are not called upon to decide the extent to which the Natural Gas Act reinforces or abrogates the private contract rights here in controversy").

adjudicate violations of tariffs, a state commission could not invade FERC's concededly exclusive jurisdiction to determine if rates are just, reasonable, and nondiscriminatory, and it is this determination that ultimately governs the question whether the rates must be passed through to retail ratepayers.

Finally, there is a fundamental fallacy to all the claims in the case that depend, directly or indirectly, on contentions that the System Operating Committee "violated" the amended MSS-1 in determining to continue to classify the ERS units as available after August 5, 1997. The claims rest on formalistic distinctions that have no substance, that ignore the determinations that FERC made when it approved the original and amended versions of MSS-1, and that ignore the scope of the filed rate doctrine.

FERC could have exercised its authority under section 205(d) of the Act to require the Operating Committee to *file* lists of the ERS units that were classified as available. Had FERC done so, the list of ERS units that are "available" would have been part of the filed tariff and there could have been no claim that their inclusion in MSS-1 calculations violated the tariff. In 1982, the LPSC made an analogous proposal when it asked FERC to condition its approval of MSS-1's cost of service formulas and automatic adjustment clauses on Entergy's periodic filing of the costs that it plugged into the tariff's formula. FERC rejected this proposal on the ground that the filing requirement would serve no beneficial purpose. It reasoned that the schedules governed transactions among affiliates to a power pool, that the cost inputs into the formula would be disclosed in retail and wholesale regulatory proceedings, and that in the event there were questionable cost inputs into the formulas, interested parties would know of them and could institute complaint proceedings under Section 206 of the Act. See *supra* at 7 & n.8.

Similarly, in amended Schedule MSS-1, FERC delegated to the Operating Committee the authority to designate ERS units as available, with no filing requirement. The amendment lists various factors that the System Operating Committee is to consider in making availability determinations; it does not "indicate in which direction the various factors point, and does not say anything about the relative weight of the factors." *LPSC*, 174 F.3d at 231. The D.C. Circuit stated that the amended MSS-1 is "certainly closer to a standard than to a rule." It deferred to FERC's judgment that it is "just and reasonable" to delegate this authority to the Operating Committee on the grounds that this is a matter of "rate design," that the amendment "set out the parameters of the operating committee's discretion," and that any abuse of discretion or "discriminatory implementation of the amendment could be remedied in a proceeding under FPA § 206." *Id.*

Under these conditions, the availability and other determinations that the System makes in its administration of the agreement are part and parcel of the "filed rate" and bind operating companies and state regulatory bodies alike, unless and until they are disapproved by FERC in Section 206 proceedings. As this Court has held, the filed rate doctrine applies not merely to rates *per se*, but also to contracts and practices that allocate costs and that are part of the bundle of rights and liabilities that are received in exchange for payment of the rate. *Nantahala*, 476 U.S. at 966-67 & 970-71; *Central Office Tel. Co.*, 524 U.S. at 224-26.

But the short answer to the *post hoc* claim is that "if FERC has jurisdiction over a subject, the States cannot have jurisdiction over the same subject." *MP&L*, 487 U.S. at 377 (Scalia, J.) (concurring in the judgment). Accord *id.* at 374 (Opinion of the Court). No further analysis is required to conclude that, in setting retail rates for Louisiana customers of ELI, the LPSC and the Louisiana state courts lack jurisdiction to address violations of a FERC tariff, whether

FERC has ruled or not. *Id.* at 375. State regulators setting retail rates do not have concurrent jurisdiction with FERC to address violations of FERC tariffs. The Federal Power Act and this Court's decisions forbid it.

CONCLUSION

The decision of the Louisiana Supreme Court should be reversed.

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March 3, 2003

No. 02-299

SUPREME COURT, U.S.
APR 2 2003

In The

Supreme Court of the United States

ENTERGY LOUISIANA, INC.,

Petitioner,

v.

LOUISIANA PUBLIC SERVICE COMMISSION, *et al.*,

Respondents.

On Writ Of Certiorari To The Supreme Court Of Louisiana

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QUESTION PRESENTED

When a holding company system violates the objective terms of a cost allocation contract filed with the Federal Energy Regulatory Commission ("FERC") and overcharges one of its subsidiaries for facilities that are ineligible to be included in the contractual assessments, does the Supremacy Clause require a state regulatory commission to pass the excess charges through to retail ratepayers?

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STATEMENT OF THE CASE

1. Overview. In this case, Entergy Corp. ("Entergy"), an electric utility holding company with operating companies in four states, violated the objective terms of a contract filed with the Federal Energy Regulatory Commission ("FERC") that provided for allocating electric generation costs among the operating companies. Entergy failed to comply with specific prerequisites, established by the FERC in approving a contract amendment, for including the costs of mothballed units in the assessments made pursuant to the contract. The Louisiana Public Service Commission ("LPSC"), a regulatory commission with plenary authority to regulate utility rates in Louisiana, discovered the overassessment and disallowed it in setting the retail rates of petitioner, Entergy Louisiana, Inc. ("ELI"). ELI and its *amici*, the United States and the Edison Electric Institute ("EEI"), now request that this Court fashion a new rule of federal preemption, in which utility violations of FERC-filed contracts would have presumptive validity under the "filed-rate" doctrine, subject to correction only by the FERC.

No one disputes the LPSC's finding that Entergy charged ELI for units in extended reserve shutdown ("ERS") that were not eligible to be included in the contractual billings. A dispute could not be raised in this Court because ELI litigated the contract issue before the LPSC, lost the issue, and did not appeal it. The contract requires adherence to a specific process for determining whether ERS units may be a basis for cost assessments, with a necessary consideration of specific information, and Entergy ignored the requirements. Having found a contractual overcharge imposed by the holding company, the LPSC did what regulatory agencies are supposed to do – it

disallowed the overcharge so that retail ratepayers would not have to pay it. The LPSC flowed through to ratepayers all charges that were properly assessed pursuant to the contract.

The briefs of ELI and the *amici* characterize the LPSC's decision as a violation of the FERC's "exclusive jurisdiction" to correct tariff violations. [ELI Br. at 15, 28; U.S. Br. at 12-13]. But this characterization has an incorrect premise; this Court's rulings and many other authorities establish that the FERC does not have exclusive jurisdiction to enforce FERC-filed contracts. Despite the filed-rate doctrine, courts routinely interpret tariffs and resolve disputes between parties, and a state regulatory agency may do so as well to prevent injury to ratepayers from excessive holding company cost allocations.

2. LPSC authority to examine affiliate transactions. The LPSC, created by the Louisiana Constitution, has the power "to regulate all common carriers and public utilities" in the state. La. Const. Art. IV, § 21(B). It is authorized to exercise "plenary" power over the reasonableness of utility rates, meaning "full, entire, absolute, perfect, unqualified" power. *Daily Advertiser v. Trans-La.*, 612 So. 2d 7, 23 (La. 1993). This authority requires the LPSC to ensure that only reasonable, prudent and lawfully-incurred costs are assessed to Louisiana consumers.

One of the primary functions of regulators, both at the state and federal level, is to ensure that cost assessments, especially those exchanged among affiliated companies, are reasonable. La. R.S. 45:1176 instructs the LPSC to examine the costs incurred by public utilities under all contracts with others, "whether affiliated with such public utilities or not," and to disallow excessive charges. Because corporate parents may maximize their profits by

overcharging regulated entities through contracts with affiliates and misallocating costs to maximize earnings, regulatory commissions must be vigilant to prevent affiliate abuses. Indeed, the Public Utility Holding Company Act, passed by Congress along with the Federal Power Act, was intended in part "to restore effective state regulation, . . . which had been seriously impaired by the existence and practices of nation-wide holding company systems." *North American Co. v. Securities and Exchange Comm'n*, 327 U.S. 686, 704 (1946).

In fulfilling its regulatory responsibilities, the LPSC often examines the legitimacy of affiliate arrangements. For example, in 1991 the LPSC imputed to South Central Bell Telephone Co. the earnings of an affiliate that had been created to publish the Yellow Pages, and adjusted payments made to another affiliate for Yellow Page sales commissions. *In re South Central Bell Tel. Co.*, Order No. U-17949-G, 121 P.U.R. 4th 338, 1991 La. PUC LEXIS 18, *15-*24 (La. P.S.C. 1991), *reversed on other grounds, South Central Bell Tel. Co. v. Louisiana Pub. Serv. Comm'n*, 594 So. 2d 357 (La. 1992). In a case involving Central Louisiana Electric Co., the LPSC imputed into the utility's earnings its profit from a subsidiary that provided fuel for regulated operations. *Ex parte Central Louisiana Elec. Co.*, Order No. U-13172-A, 1979 La. PUC LEXIS 71 (La. P.S.C. 1979).

In the case of Entergy, the LPSC often has occasion to examine the propriety of affiliate allocations. At the time of the merger between Entergy and Gulf States Utilities Co., the LPSC adopted a number of "Affiliate Interest Conditions" as a requirement for approval of the merger. *Ex parte Entergy Corp. and Gulf States Utilities Co.*, Order No. U-19904, App. C, 1993 La. PUC LEXIS 212 (La. P.S.C.

1993). In 1999, it reformed a contract between ELI and Entergy Technology Co., which provided for the unregulated technology company to resell unused fiber optic capacity that was supported by ELI's rates. The LPSC found that the "terms of the proposal are unduly favorable to ETC." *Ex parte Entergy Louisiana, Inc. and Entergy Technology Co.*, Order No. U-22225-A at 8, 1999 La. PUC Lexis 88 (La. P.S.C. 1999). It pointed out that Entergy had an incentive to "shift costs to ELI, as those costs will be recovered from the ratepayer." *Id.* at 11.

In a recent case involving Entergy Gulf States, Inc. ("EGS") an administrative law judge recommended numerous adjustments to costs allocated by Entergy to EGS. Final Recommendation, *Ex parte Entergy Gulf States, Inc.*, Docket No. U-23358 (La. P.S.C. Sept. 1, 2002). The cost misallocations included overassessments from both unregulated and regulated operations. With respect to nuclear operations, the ALJ found that Entergy employed incorrect allocation codes to shift costs from Entergy Arkansas, Inc. ("EAI") to EGS. *Id.* at 51-62. Shifting the costs to Louisiana would maximize Entergy's cash flow, because the LPSC for years has conducted annual rate reviews, while the overall rates of EAI have not been adjusted annually. The adjustments were adopted by the Commission in an Order approving a settlement. *Ex parte Gulf States Utilities Co.*, Order No. U-23358, 2002 La. PUC Lexis 17 (La. P.S.C. 2002).

A parent may maximize its profits through affiliate arrangements in two fundamental ways. First, it may adopt unfair contracts or allocation methodologies. In the case of the System Agreement, the FERC approved the contract in 1985, but it disapproved a related agreement

for allocating the costs of the Grand Gulf nuclear plant among the Entergy Operating Companies because it assigned none of these costs to EAI's predecessor, Arkansas Power & Light Co. *Middle South Energy, Inc.*, 31 F.E.R.C. ¶ 61,305 (1985). The contract was reformed to allocate the costs fairly. Second, the parent may deviate from accepted or approved cost allocation methodologies in order to maximize profits. An example is the exercise of "discretion" to breach a FERC-approved tariff.

3. Denial of authority to FERC to award reparations. In 1935, Congress adopted the Federal Power Act ("FPA") to fill a "gap" in the regulation of electric utilities that was created when this Court held that the Interstate Commerce Clause prevented the states from regulating interstate wholesale electric transactions. *Public Utilities Comm'n v. Attleboro Steam & Electric Co.*, 273 U.S. 83 (1927). The goal of the FPA, as stated in the declaration of policy, was to permit the Federal Power Commission ("FPC") – later the FERC – to regulate interstate wholesale transactions, "such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States." 16 U.S.C. § 824(a). As stated in a Senate report, the FPA was intended to extend Federal regulation "to those matters which cannot be regulated by the States in the exercise of their regulatory powers, but not to impair or diminish the power of any State commission." S. REP. No. 74-621, at 48 (1935).

In empowering the FERC to regulate wholesale rates, Congress required that new contracts for wholesale sales be filed with the agency. It empowered the FERC to modify those contracts, either on its own motion or pursuant to a complaint, on a prospective basis. 16 U.S.C. § 824d. The FPA also authorized the FERC to suspend a changed

schedule for up to five months and to grant refunds for excessive amounts collected during the period required to review it. *Id.* With regard to existing rates, Congress provided the FERC authority to investigate and determine whether the rates are unreasonable and to grant *prospective* relief. 16 U.S.C. § 824e(a). But Congress granted the FERC no authority to award refunds or other reparations for charging an unreasonable filed rate or charging more than the filed rate permits.

An early version of the FPA would have empowered the FERC to investigate whether a utility had charged an "unreasonable, excessive, or discriminatory amount . . . in violation of any provision of this title" and "make due reparation to the complainant. . . . " S. REP. 74-1725, § 213(a) (1935). That provision was removed in the Senate by the Committee on Interstate Commerce. It determined that the power to issue reparation orders was an "appropriate sectio[n] for a State utility law, but the committee does not consider [it] applicable to one governing merely wholesale transactions." S. REP. No. 74-621, at 20 (1935). Congress provided authority for the FERC to file an injunction suit in a "proper District Court of the United States" if it determined that a utility was violating the Act or one of its orders. 16 U.S.C. § 825m.

The fact that the FERC was granted no reparations authority has been recognized by this Court. In a dissenting opinion in *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246 (1951), a case in which the Court held that the filed-rate doctrine prevented a court from reforming past rates, even when those rates were obtained through fraud, Justice Frankfurter recognized that the FPC had no authority to award damages for violations

of the Act. He contended in dissenting that a court should be able to award these damages. He said:

> We have seen that [the Federal Power Act] does not authorize the Commission to award reparations to those subjected to unreasonable rates. The Act likewise does not afford to the Commission the authority conferred on administrative agencies under other regulatory statutes to award damages to those injured by violations of the Act. The Power Act, it is true, does give the Commission authority to look into past rates in order to determine whether the Act has been violated. But such an inquiry cannot be made the basis for an administrative award of damages to the victims of the violations. . . .
>
> *Id.* at 260 (citations omitted).

This statement reflected the fact that the statute provided no refund authority to the FPC beyond that contained in Section 205.

Congress had no need to vest the FPC with exclusive jurisdiction to determine tariff disputes because state courts were available to hear these common law contract claims. Indeed, this Court held in 1922 that the filed-rate doctrine did not prevent a state court from hearing a dispute concerning a tariff filed with the Interstate Commerce Commission. *Great N. R. Co. v. Merchants Elevator Co.*, 259 U.S. 285 (1922). The Court applied this same rule to the FPC in 1961. In a case arising under the Natural Gas Act ("NGA"), which is virtually identical to the FPA, the Court held that a state court may hear a claim that a customer was overcharged under a contract for the sale of natural gas that was filed with the FPC. *Pan American Petroleum Corp. v. Superior Court of Del.*, 366 U.S. 656 (1961).

Except when contractual issues are so technical or infused with policy as to require invoking the "primary" jurisdiction of a regulatory agency, courts often exercise authority to determine whether FERC-filed tariffs were violated and award damages. *Pan American Petroleum Corp. v. Kansas-Nebraska Natural Gas Co., Inc.*, 297 F.2d 561, 567 (8th Cir.), *cert. denied*, 370 U.S. 937 (1962); *Gulf States Utilities Co. v. Alabama Power Co.*, 824 F.2d 1465, 1472 (5th Cir. 1987); *Cleveland Electric Illuminating Co. v. City of Cleveland*, 363 N.E. 2d 759 (Ohio Ct. App. 1976), *cert. denied*, 434 U.S. 856 (1977). This approach accords with decisions rendered under other statutory schemes. *E.g., Brown v. MCI WorldCom Network Services, Inc.*, 277 F.3d 1166 (9th Cir. 2002). Indeed, the FERC frequently declines to exercise even its primary jurisdiction to interpret tariffs, leaving it to the courts to interpret and enforce contract language. *Arkansas Louisiana Gas Co. v. Hall*, 7 F.E.R.C. ¶ 61,175 (1979); *PPL Montana, LLC*, 96 F.E.R.C. ¶ 61,313, 62,208 (2001); *Schuylkill Energy Resources, Inc. v. Pennsylvania Power & Light Co.*, 81 F.E.R.C. ¶ 61,056, 61,278 (1997).

4. The FERC's assertion of power to grant refunds for overcharges. Although it has no statutory authority to award refunds for tariff violations, the FERC in the past two decades has asserted the inherent power to do so, and that determination has been accepted in the lower courts. In a leading case, *Consolidated Gas Trans. Corp. v. FERC*, 771 F.2d 1536 (D.C. Cir. 1985), the United States Court of Appeals for the District of Columbia Circuit recognized the absence of explicit authority to award refunds of improper collections under a tariff filed pursuant to the NGA. It upheld the FERC's authority to do so, however, by inferring it from the power to take

actions "necessary or appropriate to carry out the provisions of this chapter." *Id.* at 1550. In *Towns of Concord, Norwood & Wellesley v. FERC*, 955 F.2d 67 (D.C. Cir. 1992), the same court inferred this authority from a parallel provision of the FPA. *Id.* at 73. Although this Court does not appear to have decided the issue, the FERC's inferred power to interpret tariffs and award refunds appears to have become accepted.

Paradoxically, the FERC's assertion of this "equitable" refund authority permits a one-way departure from the filed-rate doctrine. On the one hand, the FERC has no power to retroactively adjust an unreasonable filed rate and require a seller to repay excessive amounts collected pursuant to that rate. *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246 (1951). On the other, when a utility bills and collects amounts in excess of the filed rate, the courts have ruled that the FERC has "discretion" not to order refunds. *Towns of Concord, Norwood & Wellesley v. FERC*, 955 F.2d 67, 75 (D.C. Cir. 1992). By not ordering refunds, the FERC effectively sanctions the overcharge and reforms retroactively the filed rate.

5. FERC proceeding concerning Entergy's first tariff violation. The Entergy System Agreement provides the basis for equalizing among the operating companies certain cost imbalances associated with facilities that are "used" for the mutual benefit of all the companies. [Joint App. at 8.]. The System Agreement is a contract executed among the Entergy Operating Companies and Entergy Services, Inc. It provides the "contractual basis" for the planning, construction and operation of the transmission and generation facilities of the System and for equalizing the costs of certain facilities "used" for the benefit of all

the companies. [*Id.* App. at 8]. The agreement includes definitions, objectives, obligations of the operating companies, and service schedules for allocating costs, among other provisions. [Joint App. at 5-24 (excerpts)].

The 1982 System Agreement was approved by the FERC in 1985, in a decision that also allocated the costs of the Grand Gulf nuclear unit among the operating companies. *Middle South Energy, Inc.*, 31 F.E.R.C. ¶ 61,305 (1985). Service Schedule MSS-1 provided the basis for equalizing the costs of generating capability, based on the costs associated with oil and gas units. Under that Service Schedule charges could be assessed only for "available" generating units. Companies with less than their proportionate shares of "available" generation made equalization payments to companies with more than their proportionate shares. [See Joint App. at 16-17]. MSS-1 provided that "a unit is considered available to the extent its capability can be demonstrated and (1) is under the control of the System Operator, or (2) is down for maintenance or nuclear refueling." [Pet. App. at 123a].

In 1986, Entergy undertook a program to place units in ERS status, in order to save operating and maintenance costs. These units had been constructed decades earlier and many were in dilapidated condition. [Pet. App. at 113a ("specific examples" cited by the Louisiana Commission in FERC hearing)]. The ERS program allowed Entergy to reduce operating costs below the amounts included in retail rates, thus enhancing corporate profits. *Louisiana Pub. Service Comm'n v. FERC*, 174 F.3d 218, 227 (D.C. Cir. 1999). Only if Entergy filed for a rate change, or retail regulators initiated a rate proceeding, would the cost reductions be flowed through to retail ratepayers.

The ERS capacity did not meet the conditions for being deemed "available" under MSS-1. Indeed, the ERS capacity on the Entergy System was placed in storage for an indefinite time period, in a state of ill repair, and required extensive refurbishment to provide electricity to the System. [Pet. App. at 123a]. Nevertheless, the Entergy Operating Committee exercised its purported "discretion" to include the units as "available" for billing. This action increased the cost assessments to ELI and Entergy Mississippi, Inc. in comparison to what the costs otherwise would have been; it benefited EAI and Entergy New Orleans, Inc. ("ENO"), which had more-than-proportionate ERS capacity. [Pet. App. at 141a].

Entergy had good reason to continue requiring that payments be made for the ERS units. If the payment levels had changed, the System might have been forced to seek rate increases in Arkansas and New Orleans, and regulators in Louisiana and Mississippi might have been alerted to the need to pursue rate reductions. Thus, an Entergy executive admitted that the System sought to "maintain stability in MSS-1 payments and receipts so as to avoid the initiation of rate cases by state regulators." *Louisiana Pub. Service Comm'n v. FERC*, 174 F.3d 218, 229 (D.C. Cir. 1999). This strategy "proved successful until 1994." *Id.* By avoiding rate cases, the System reaped for shareholders the benefits of the ERS program and other cost reduction programs undertaken by the utility. *See id.* at 227, 230.

In 1993, in an order approving the merger of Entergy and Gulf States Utilities Co., the FERC instituted an investigation of whether Entergy had violated the System Agreement by treating the ERS units as "available." The case was assigned for hearing to a FERC administrative

law judge ("ALJ"). The ALJ determined that the System Agreement was "clear and unambiguous." Although Entergy claimed "discretion" to depart from the terms of the agreement, the ALJ found that discretion could not be inferred from the agreement. [Pet. App. at 125a]. The ALJ accepted Entergy's argument that the utility acted in "good faith," but asserted that "[g]ood faith, however, cannot excuse a tariff violation." [*Id.* at 125a]. The ALJ stated:

> There is no dispute that the System Agreement is the filed and legal rate. The filed rate is the only legal rate. It has long been established that a regulated utility may not charge rates for its services other than those properly filed with the appropriate regulatory authority.
>
> [*Id.* at 124a-125a (citations omitted)].

Paradoxically, after finding that "good faith . . . cannot excuse a tariff violation," the ALJ proceeded to recommend against refunds because "Entergy does not deserve censure or punishment for its good faith actions." [*Id.* at 124a, 139a].

The FERC affirmed this decision, but pointedly avoided any reliance on the "good faith" rationale. [*Id.* at 103a: "This is not a case where we are denying the imposition of refunds because Entergy acted in 'good faith'"]. Instead, the FERC relied heavily on a rationale advanced by Entergy, that violating the tariff was necessary to provide an "incentive" to the operating companies to comply with Entergy's directive to place units in ERS status. [*Id.* at 101a-102a]. According to the holding company, its operating companies might have resisted complying with the ERS program unless they kept a constant level of MSS-1 payments. [*Id.* at 164a (citing Entergy

testimony)]. The FERC also offered other reasons, including the assertion that the end result of the violation was just and reasonable. [*Id.* at. 103a].

The United States Court of Appeals for the District of Columbia Circuit affirmed the FERC's decision. *Louisiana Pub. Service Comm'n v. FERC*, 174 F.3d 218 (D.C. Cir. 1999). Applying a "'particularly narrow scope of review,'" it approved the FERC's determination that the operating companies needed an "incentive" to obey Entergy's directive to implement the ERS program. *Id.* at 224, 226-27. It also upheld a finding of no unjust enrichment from the tariff violation, although it acknowledged that the System acted to "avoid the initiation of rate cases by state regulators" so that it could retain the benefit of cost decreases. *Id.* at 229. The court explained that "it is hardly unusual for a utility whose rates are set by cost-of-service rate-making principles to seek to reduce its costs, thereby increasing profits, during the interim between rate-setting proceedings." *Id.* at 230.

6. Adoption of a tariff amendment with specific parameters to curb Entergy's discretion. Although it refused to order refunds, the FERC did approve an amendment to Service Schedule MSS-1 designed to deal explicitly with the ERS program. [Pet. App. 104a-105a]. The amendment provided that Entergy's Operating Committee could count ERS units as available if it had the "*intent of returning the unit to service at a future date*." [Pet. App. at 104a (emphasis in original)]. The Operating Committee could designate an ERS unit as available only if it performed a specified analysis, considered specific criteria, and recorded its findings in its minutes. [*Id.*] The amendment provided that a unit could be deemed "available" if it:

> *is in extended reserve shutdown (ERS) with the intent of returning the unit to service at a future date in order to meet Entergy System requirements. The Operating Committee's decision to consider an ERS unit to be available to meet future System requirements shall be evidenced in the minutes of the Operating Committee and shall be based on consideration of current and future resource needs, the projected length of time the unit would be in ERS status, the projected cost of maintaining such unit, and the projected cost of returning the unit to service.*
>
> *Id.* (emphasis in original).

The LPSC contended at the FERC that this amendment provided too much discretion to Entergy. The Company denied this contention, stating that the "modified language requires the Operating Committee to document its decisions and to explain on the basis of sensible parameters why an ERS unit continues to warrant being counted in MSS-1." [Brief on Exceptions of Entergy Services, Inc., Docket No. EL94-13-000 (F.E.R.C.)]. The ALJ rejected the LPSC's vagueness argument, holding that the "amendment is neither ambiguous nor does it provide the Operating Committee with unfettered discretion. The amendment sets out the parameters of the Operating Committee's discretion." [Pet. App. at 152a]. Similarly, the FERC ruled that the amendment sufficiently "define[d] the parameters that the Operating Committee must follow in determining whether a unit is eligible for inclusion in Schedule MSS-1." [Pet. App. at 164a]. The court of appeals affirmed this determination, holding that review of Entergy's conduct would be "facilitated by the requirement that the operating committee record the reasons for its decision in writing." *Louisiana Pub. Service Comm'n v. FERC*, 174 F.3d 218, 231 (D.C. Cir. 1999).

7. Entergy's violation of the amended tariff. The amended tariff was approved in Opinion No. 415, issued August 5, 1997. On September 30, 1997, the Operating Committee met, reviewed the new language, and declared that "the units currently in ERS should continue to be deemed 'available' for purposes of determining company capability." [Resp. App. at 13]. In doing so, the Operating Committee failed to engage in the process contemplated by the FERC or to analyze the information designated in the "parameters" established by the FERC. [*Id.* at 12-15]. Further, the Operating Committee made no effort to record reasons, based on these "parameters," for its decision.

At its meeting, the Operating Committee reviewed a "Load and Capability Forecast" and approved it. This forecast showed that all the ERS capacity on the System – 1284 megawatts – would remain collectively in ERS status throughout the entire 10-year forecast period. [Resp. App. at 14, l.13]. The Operating Committee did not consider any "plan" to return the units to service at any "future date." [Resp. App. at 12-15]. Moreover, the Operating Committee had no information concerning "the projected length of time" any unit "would be in ERS status," nor did it have data concerning the "projected cost of maintaining such unit." [*Id.* at 12-15]. The Operating Committee was shown a one-page bar chart of projected costs of returning ERS units to service, which was labeled "Work in Progress" and was based on incomplete and outdated information. [*Id.* at 15; Pet. App. at 53a, 74a]. The Operating Committee recorded no analysis of relative costs, no theory of "system-wide" benefits, and no other substantive reason to support its decision to support its all-encompassing ERS decision. [Resp. App. at 13]. As a result of this decision, Entergy

continued to bill ELI for the costs of ERS units in other jurisdictions.

Although not mentioned in the Operating Committee minutes, Entergy had a good corporate reason to continue counting all the ERS units as "available." By 1997 the Louisiana Commission had instituted annual rate reviews of ELI and EGS. *Ex parte Louisiana Power & Light Co.*, Order No. U-20925 (corrected), 1995 La. PUC LEXIS 39 (La. P.S.C., 1995); *Ex parte Entergy Corp. and Gulf States Utilities Co.*, Order No. U-19904, App. 1, 1993 La. PUC LEXIS (La. P.S.C. 1993). Reduced MSS-1 payments for these companies would be reflected quickly in reduced retail rates. Investigations to reduce rates were not conducted annually for EAI and ENO. For a number of years, the Arkansas PSC had not conducted annual rate reviews. In 1996, EAI filed a request for a rate freeze and proposed a procedure that would allow EAI to set aside excess earnings as a protection against potential stranded costs in the event of deregulation. In late 1997 the Arkansas PSC approved a settlement implementing this procedure. *In re Entergy Arkansas, Inc.*, Order No. 31, Docket No. 96-360-U (Ark. P.S.C. 1997). New Orleans conducted annual reviews from 1994-96, but had only one review between 1996 and 2001.

8. LPSC proceeding. Under the Formula Rate Plan that the Louisiana Commission adopted for reviewing ELI's rates, ELI filed a report for the period commencing July 1, 1997, based on a 1996 test year. The LPSC's Staff examined the report and reached agreements with ELI on many ratemaking issues. The parties stipulated that three issues should proceed to hearing before an ALJ, including "whether payments under the System Agreement for the cost of generating units in Extended Reserve

Shutdown should be included or excluded from ELI's revenue requirement." [Pet. App. at 25a]. The evidentiary examination focused on whether Entergy violated the terms of the new tariff adopted by the FERC. Both ELI and the LPSC Staff submitted evidence on this issue.

The LPSC Staff argued that 1996 costs assessed to ELI pursuant to tariff violations should not be assessed to retail ratepayers. Although the FERC decided not to order refunds for the period 1986-97, the Staff contended that the costs included in the 1996 test year could be disallowed because they were assessed in violation of the original FERC tariff, and the FERC's decision not to order refunds *among the operating companies* did not require imposing the excessive charges on retail ratepayers. [*Id.* at 44a]. The Staff also argued that the Operating Committee's new decision at the September 30, 1997 meeting violated the tariff amendment and that costs incurred pursuant to that decision should not be assessed to ratepayers.

As to the 1996 costs, the ALJ and the LPSC held that the August 5, 1997 decision of the FERC retroactively validated Entergy's decision to assess charges in excess of the filed rate. As the Order noted, "in a seemingly paradoxical manner, FERC has approved the results of what it found to be a violation of a FERC tariff." [*Id.* at 63a]. The Order determined that it could not review the reasonableness of the 1996 payments because the FERC's decision effectively imposed "an obligation on ELI to make those payments." [*Id.* at 64a].

As pointed out repeatedly by ELI and the United States, the Louisiana Commission's Order contains the

statement that "a determination of violation or compliance with a FERC tariff is peculiarly within FERC's purview." [ELI Br. at 15; U.S. Br. at 19]. This statement paraphrases a contention of ELI in the proceeding and is not supported by any authority. [Pet. App. at 64a, 72a]. In view of this Court's holdings and the rulings of lower courts, the statement is literally untrue, because the FERC does not have exclusive jurisdiction to interpret FERC-filed contracts. The language may have been intended simply to acknowledge that the FERC, and not the LPSC, has the power to order refunds *among the operating companies* that are parties to the contract. [Pet. App. at 65a (contrasting refund decision with prospective issue); Pet. App. at 14a (Louisiana Supreme Court, in citing "exclusive jurisdiction" language in LPSC Order, states that the LPSC acknowledged it could not reexamine the refund decision)].

As the underpinning for its decision to disallow the ERS costs prospectively, the LPSC *did analyze* whether Entergy violated the terms of its tariff. It determined that ELI had a duty to incur only prudent costs, and that duty included the requirement to ensure that Entergy followed "the criteria set forth in the amended Section 10.02 in reaching a decision regarding the availability status of ERS units. . . . " [Pet. App. at 65a]. The LPSC conducted a hearing on this issue, one in which ELI participated and produced evidence. [Pet. App. at 46a]. ELI was hard pressed to contend that the Operating Committee satisfied the System Agreement's criteria; instead, it returned to the contention that the Operating Committee acted in "good faith," which purportedly "satisfied the criteria established by the FERC." [*Id.* at 48a].

The LPSC made extensive findings that the Operating Committee failed to follow the criteria established in the

tariff amendment for including ERS units in the MSS-1 assessments. It found that the Operating Committee had no plan to return an ERS unit to service at a particular time and did not even make the requisite effort "to ascertain that ERS units would be needed within the next 10 years." [*Id.* at 54a]. Moreover, the LPSC found that the Operating Committee did not reach a decision " 'based on consideration of current and future resource needs, the projected length of time the unit would be in ERS status, projected cost of maintaining such unit, and the projected cost of returning the unit to service.' " [*Id.* at 54a, 74a]. Indeed, the "Operating Committee did not even seek the information necessary to reach a well-considered decision." [*Id.* at 74a]. ELI stipulated that this issue be set for hearing, litigated the tariff compliance issue at the LPSC, and did not appeal the findings regarding the violation.

The Commission found that ELI was imprudent in acquiescing "to the parent company's decision without regard to the impact of such increased expenses on ELI's ratepayers." [*Id.*] Since the Operating Committee did not follow the "criteria set forth in the amended Section 10.02," ELI should not have paid the excess charges. [*Id.* at 74a, 75a]. The LPSC concluded that the "increased MSS-1 payments resulting from the treatment of ERS units as available under Schedule MSS-1 in violation of a FERC tariff should be removed from the company's calculation of its cost of service. . . . " [*Id.* at 77a].

A state district court and the Louisiana Supreme Court affirmed the LPSC's ruling. The Louisiana Supreme Court observed that the record supported the determination that Entergy did not comply with its tariff and "[t]he record is devoid of any attempt by ELI to minimize its

costs." [*Id.* at 20a]. Thus, the Court upheld the finding of imprudence.

SUMMARY OF ARGUMENT

1. In enacting the Federal Power Act, Congress vested the FERC with exclusive jurisdiction to review wholesale power contracts and establish just and reasonable rates. But Congress did not give the FERC exclusive jurisdiction, or *any* explicit jurisdiction, to determine contract disputes and award refunds for tariff violations. This Court and many others have ruled, both with respect to tariffs filed with the FERC and those filed with other regulatory agencies, that state and federal courts may interpret tariffs and award damages for violations. Only when a matter arises that falls peculiarly within the special expertise of a regulatory agency must a court defer, under the doctrine of "primary" jurisdiction, to the judgment of the agency as to the meaning of a tariff. If state and federal courts have the power to interpret tariffs, then so do state agencies. The fact that the FERC has inferred its own power to award refunds does not displace the jurisdiction of courts and state regulators. To support preemption, the Court must find from the statute that Congress intended to displace state jurisdiction.

2. Because they have no authority to support their claim of exclusive FERC jurisdiction to resolve tariff disputes, ELI and its *amici* seek to apply authorities holding that the FERC has exclusive jurisdiction to determine just and reasonable rates. Thus, they rely on *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953 (1986) ("*Nantahala*"), which involved a state agency's attempt to countermand a FERC power allocation, and *Mississippi Power & Light Co. v. Mississippi* ("*MP&L*"),

487 U.S. 354 (1988), which involved a state's attempt to review the reasonableness of costs deemed "just and reasonable" by the FERC, based on an issue that could have been raised at the FERC as it exercised its exclusive jurisdiction to establish the rate. Neither case involved a claim of a contract violation, or an attempt to pass through costs assessed in violation of a tariff. Thus, the cases do not apply in this context.

3. In disallowing charges assessed by Entergy to ELI for ERS units, the LPSC performed a necessary function of state regulatory agencies – it corrected a parent's abuse of affiliate relationships. The LPSC did not question the reasonableness of the contract amendment adopted by the FERC, but accepted that amendment as the predicate for its decision. The LPSC disallowed the excess charges because they were assessed in bald-faced violation of the tariff. Entergy ignored the process established by the FERC as a prerequisite for including an ERS unit in MSS-1 capacity, failed to consider the factors established by the FERC as a basis for an ERS determination, and failed to record its reasoning process in the minutes. No one can reasonably dispute the LPSC's finding that the "MSS-1 payments result[ed] from the treatment of ERS units as available under Schedule MSS-1 in violation of a FERC tariff. . . . " [Pet. App. at 77]. When affiliates allocate costs in violation of FERC-filed contracts, regulatory agencies are *supposed* to disallow the excess costs. *Nantahala* and *MP&L* implicitly require that action, just as they require state agencies to pass through the amount paid in compliance with the tariff.

4. ELI and its *amici* do not directly question the finding of a tariff violation; indeed, ELI never appealed that finding. Instead, these parties now request that the

Court adopt a *new rule* that the FERC should exercise exclusive jurisdiction over all claims that FERC-filed contracts have been violated. This new rule would require all aggrieved parties to go to the FERC when presented with an overcharge, and its preemptive effect would require state agencies to pass overcharges through to customers and pursue relief only at the FERC. In effect, they ask the Court to overrule precedent, hamstring state agencies, and create a never-ending line of claimants at the agency.

5. The FPA was designed to fill the *Attleboro* gap – a gap in the regulation of interstate transactions – and to *help*, not *hinder*, state agencies in their regulation of holding companies. Yet ELI, the United States, and EEI now advocate that the Court turn the FPA upside down and vest holding companies with federal preemptive power, subject to correction only in a complaint case at the FERC. ELI contends that determinations made by the Operating Committee "bind state commissions unless . . . disallowed by FERC. . . . "; the United States acknowledges the LPSC's finding of a violation, but contends that any charges assessed by Entergy under the System Agreement "are presumptively lawful, until FERC determines otherwise;" EEI argues for a "bright line" in which any charges assessed by a seller under a FERC-filed schedule should be deemed presumptively lawful as to all buyers and state agencies. [ELI Br. at 22-23; U.S. Br. at 13; EEI Br. at 11-12]. But if this Court hands preemptive power to holding companies and other utility sellers, it will permit the very type of damage to consumers that Congress sought to prevent.

6. State agencies are already handicapped in their efforts to regulate holding company subsidiaries. The

utility has the information necessary for regulation; it has virtually unlimited resources; it has expert consultants and experienced lawyers; and it has the ability to control transactions. To hand these companies a badge of presumptive correctness when they violate their own rate schedules would effectively countenance many affiliate abuses. State agencies do not have the resources to litigate every tariff violation at the FERC, and the FERC has little inclination to hear the cases. Thus, requiring resort to the FERC would empower holding companies to abuse FERC tariffs, a result inconsistent with the purpose of the FPA. Worse yet, creating a "bright line" rule under which future transmission operators may impose any contract interpretation on any buyer, subject only to FERC review, would pervert the intent of the FPA.

ARGUMENT

I. NO BASIS EXISTS IN THE FEDERAL POWER ACT, THE DECISIONS OF THIS COURT, OR OTHER RULINGS TO SUPPORT A HOLDING THAT THE FERC HAS EXCLUSIVE JURISDICTION TO HEAR CASES INVOLVING TARIFF VIOLATIONS.

In the FPA, Congress did not vest the FERC with exclusive jurisdiction to enforce tariffs. Indeed, Congress granted the FERC no jurisdiction to take this action, and the FERC apparently did not exercise it for decades. The FERC's assumption of "inherent" jurisdiction to award refunds for tariff violations, a jurisdiction that at best is shared with other tribunals, cannot support a claim of federal preemption. The basis for preemption must be found in the statute. But the FPA shows no intent to

displace state power or to grant the FERC "exclusive" jurisdiction over contract disputes.

Neither *Nantahala* nor *MP&L* suggests that the FERC possesses exclusive jurisdiction to interpret tariffs. Those cases dealt with the FERC's *ratemaking* power, in which state agencies attempted to disallow costs assessed *in compliance with* a FERC tariff. The FERC admittedly has exclusive jurisdiction to establish just and reasonable rates, but not to correct contract violations. State agencies may properly use the filed rate to determine whether a parent's charges to a subsidiary are correct and, if not, to disallow the excess costs. In this case, the LPSC used a federally-enacted standard as the basis for assessing utility conduct, just as Congress intended in passing the FPA. That action did not violate federal law.

A. The Federal Power Act Does Not Vest the FERC With Exclusive Jurisdiction to Interpret Tariffs and Correct Tariff Violations.

Nothing in the FPA requires that the FERC decide whether a FERC tariff has been violated. Sections 205 and 206 of the Federal Power Act provide exclusive jurisdiction to the FERC to determine just and reasonable wholesale rates. Section 205 permits the FERC to suspend a change in a rate schedule and refund excess amounts if it finds the new schedule excessive; Section 206 permits the FERC to make refunds for a limited period *after* the filing of a complaint if it finds that the filed rate was not reasonable. 16 U.S.C. §§ 824d, 824e. There is no explicit authority for the FERC to provide refunds based on tariff violations; that power has been *inferred* by the FERC, but this assumption of authority does not displace the power of

courts and state agencies to consider disputes that come within their jurisdiction concerning tariff violations.

The "filed-rate doctrine," which preserves the exclusive jurisdiction of regulatory agencies to establish just and reasonable rates, does not extend to cases involving tariff interpretations. This Court rejected that contention in *Great N. R. Co. v. Merchants Elevator Co.*, 259 U.S. 285 (1922), where it upheld the power of a state court to interpret and apply a tariff. In that case, an elevator company sued in state court to recover costs that it alleged were assessed in violation of a tariff approved by the Interstate Commerce Commission. The state court construed the tariff and determined whether the charge was correctly assessed.

This Court affirmed, holding that the tariff construction did not have to be determined by the ICC. It noted that the parties conceded the "validity of the tariff." *Id.* at 290. Further, although rate uniformity was a purpose of the Interstate Commerce Act, uniformity could be preserved through the process of appellate review. Thus, the Court determined that "the attainment of uniformity does not require that in every case where the construction of a tariff is in dispute, there shall be a preliminary resort to the Commission." *Id.* at 291. Instead, unless the matter requires the exercise of specialized agency expertise concerning the "peculiar meaning" of words, the state courts may construe a tariff. *Id.* at 292, 294.

This Court applied *Merchants Elevator* in ruling that the FPC did not have exclusive jurisdiction to interpret contracts under the NGA, a parallel statutory scheme that is virtually identical to the FPA. Indeed, the Court cites "interchangeably" precedents interpreting parallel provisions of the NGA and FPA. *Arkansas Louisiana Gas Co. v.*

Hall, 453 U.S. 571, 578 n.7 (1981). In *Pan American Petroleum Corp. v. Superior Court of Del.*, 366 U.S. 656 (1961), a Kansas agency mandated minimum prices to be paid for gas produced in Kansas, in excess of contract rates filed with the FPC. The state order mandating the minimum prices was overturned in this Court, and the customer sued in state court to recover the excess charges. The gas producers argued that the suit sought to enforce a federal tariff and could only be brought at the FPC, but the Court held that the suit presented a contract claim, subject to the jurisdiction of the state court. Since the suit did not seek to alter the terms of the contract, it did not fall within the exclusive jurisdiction of the FPC. *Id.* at 662-63. Further, the Court rejected the argument that FPC review was required for uniformity, holding that the process of appellate review could adequately ensure uniformity. *Id.* at 665. The Court concluded: "We hold that the state courts of Delaware do have jurisdiction to hear and decide the claims that Cities Services has formulated." *Id.* at 666.

This Court held that the state court could hear the contract dispute in *Pan American* because the claim arose under state contract law. Even though the contracts were filed with the FPC, that fact did not change the nature of the claim. 366 U.S. at 663. The Court said: "The rights as asserted by Cities Service are traditional common-law claims. They do not lose their character because it is common knowledge that there exists a scheme of federal regulation of interstate transmission of gas. . . . " *Id.* Given the holding that state courts may interpret FERC-filed contracts in the exercise of their state jurisdiction to hear contract disputes and award damages, state agencies should be free to do so in the exercise of their state jurisdiction to determine reasonable retail rates. In Louisiana,

that power is delegated explicitly to the LPSC. La. Const. Art. IV, § 21(B); La. R.S. 45:1176.

The determination that the FERC does not have exclusive jurisdiction to enforce tariffs has a strong statutory basis. In passing the FPA, Congress deliberately withheld from the FERC the power to make "reparations." S. REP. No. 74-621, at 20 (1935). It provided the FERC power to make refunds of changed rates for the period after a suspension and later, in 1988, provided limited power to refund rates deemed unreasonable for the period after the commencement of a Section 206 proceeding. 16 U.S.C. § 824d, § 824e. But the FERC was given no other refund authority, either for unreasonable rates in effect prior to a proceeding or for violations of a filed rate. Concerning violations, the FERC was empowered only to seek injunctive relief in a United States District Court. 16 U.S.C. § 825m.

As of 1951, this Court understood that the FERC had no authority to order restitution, even for fraudulent conduct in establishing rates. In *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246 (1951), all the members of the Court assumed that the FPC could not award damages for a utility's fraud in filing a rate, but disagreed as to whether a court could do so. Justice Frankfurter argued that the FPC should be permitted to determine the reasonable rate to replace the fraudulently-induced rate, so that a court could award damages. But he acknowledged that the Federal Power Act "does not authorize the Commission to award reparations to those subjected to unreasonable rates" and "likewise does not afford the Commission the authority . . . to award damages to those injured by violations of the Act. . . . " [*Id.* at 260 (Frankfurter, J., dissenting)]. This statement was part of a

dissent, but was not a point of disagreement in the decision.

The FERC apparently exercised no authority to award damages for contract violations for decades after its creation. In 1985, the United States Court of Appeals for the District of Columbia Circuit approved an early exercise of this authority in *Consolidated Gas Trans. Corp. v. FERC*, 771 F.2d 1536 (D.C. Cir. 1985). The Court noted that the FERC could use " 'means of regulation not spelled out in detail' " so long as its action was consistent with the policy embodied in the NGA. *Id.* at 1551. The court found statutory authority to support the FERC's action in Section 16 of the Act, which authorizes actions "necessary or appropriate" to carry out the purposes of the statute. *Id.* at 1550, citing 16 U.S.C. § 717o. This decision was cited with approval in *Towns of Concord, Norwood & Wellesley v. FERC*, 955 F.2d 67, 73 (D.C. Cir. 1990), a case involving the FPA. But these decisions simply find sufficient authority for the FERC to exercise concurrent jurisdiction with other tribunals; they do not hold that the FERC has exclusive jurisdiction.

Decisions of the lower courts confirm that the filed-rate doctrine does not provide either the FERC or other agencies with exclusive jurisdiction to interpret and enforce contracts. For instance, before it merged with Entergy, Gulf States Utilities withheld payments to Alabama Power Co. and filed suit in federal court, claiming that it should not have to purchase electricity from that utility under a FERC-approved contract. *Gulf States Utilities Co. v. Alabama Power Co.*, 824 F.2d 1465 (5th Cir. 1987). The defendant argued that only the FERC, not the courts, had jurisdiction to decide the dispute because the contract was filed with and approved by the FERC. *Id.* at

1470. The Fifth Circuit held that the Federal Power Act preempts courts and regulators from "changing the filed rate," "impos[ing] a rate different from the filed rate" or changing a "FERC allocation." *Id.* But the court held that the doctrine did not prevent a determination that a utility billed excessive costs under a tariff. It said:

> Finally, GSU complains that Southern has sold more than it should have under Schedule E by overstating the amount of available "Long Term Power." The FPA does not preempt this claim. Unlike Hall in *Arkla*, GSU does not seek relief based on a rate different from the filed rate. Rather, GSU complains about the quantity sold *at the filed rate* under Schedule E. . . .
>
> *Id.* at 1472.

In this case, similarly, Entergy billed ELI for an excessive quantity of capacity at the filed rate.

Gulf States Utilities is consistent with many other authorities holding that the filed-rate doctrine does not preclude courts from interpreting and enforcing tariffs. For instance, in a recent decision of the United States Court of Appeals for the Ninth Circuit, a communications carrier argued that the filed-rate doctrine prevented a federal district court from determining whether the carrier violated a tariff approved by the Federal Communications Commission. *Brown v. MCI WorldCom Network Services, Inc.*, 277 F.3d 1166 (9th Cir. 2002). The court found that the matter did not have to be heard at the FCC: "The filed-rate doctrine precludes courts from deciding whether a tariff is reasonable, reserving the evaluation of tariffs to the FCC, but it does not preclude courts from interpreting the provisions of a tariff and enforcing the tariff." *Id.* at 1171.

Other federal courts have recognized that the filed-rate doctrine does not vest exclusive jurisdiction in a rate-setting agency to determine whether a tariff has been violated. *See, e.g., Pan American Petroleum Corp. v. Kansas-Nebraska Natural Gas Co.*, 297 F.2d 561, 567, *cert. denied*, 370 U.S. 937 (1962) (court could determine dispute concerning FPC-filed contract); *Southern Pacific Transp. Co. v. San Antonio*, 748 F.2d 266, 272 (5th Cir. 1984) (Courts often interpret terms of filed rate); *United States v. Garner*, 134 F. Supp. 16, 18 (E.D.N.C. 1955) ("It is well settled that . . . the courts may decide questions of construction of tariffs as legal documents."); *Consolidated Terminal Systems, Inc. v. ITT World Communications, Inc.*, 535 F. Supp. 225, 233 (S.D.N.Y. 1982).

A number of state courts also have determined that the filed-rate doctrine does not prevent courts from determining whether a party followed the terms of a tariff. *See, e.g., Union Pac. R.R. v. Structural Steel & Forge Co.*, 344 P.2d 157, 160 (Utah 1959) ("Since the words in the tariff are used in their ordinary meanings [a] state court can apply that legal construction to a state cause of action." (citations omitted)); *Pennsylvania R. Co. v. Nasshorn*, 116 N.Y.S. 2d 365 (N.Y. App. Div. 1952) (application of tariff classification is issue for courts); *Pennsylvania R. Co. v. Chromcraft Corp.*, 424 S. W.2d 104, 106 (Mo. Ct. App. 1967) ("Where . . . the issue [is] the construction or interpretation of a published tariff the courts, including a state court, may entertain jurisdiction."). Since state courts may perform this function, so may a state agency.

The federal and state courts also have applied a "primary jurisdiction" doctrine, which permits them to defer their jurisdiction when the interpretation of a tariff

requires special expertise presumably residing in the rate-setting agency. *See Great N. R. Co. v. Merchants Elevator Co.*, 259 U.S. 285 (1922) (Courts may decide tariff interpretation unless it requires "specialized agency expertise."). Thus, courts may defer when the issue is not within "the conventional experience of judges," but rather involves technical or policy considerations that first must be decided by the agency to protect a regulatory scheme. *National Communications Ass'n v. AT&T Corp.*, 46 F.3d 220, 222 (2d Cir. 1995); *Brown v. MCI WorldCom Network Services, Inc.*, 277 F.3d 1166 (9th Cir. 2002). Under the doctrine of primary jurisdiction, however, the FERC presumably would issue a declaratory order as to the meaning of the tariff, to be later applied by a court. *See, e.g., Arkansas Louisiana Gas Co.*, 7 F.E.R.C. 61,175 at 61,322 (F.E.R.C. 1999); *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246, 264 (1951). In *Montana Dakota Utilities,* Justice Frankfurter, in dissent, discussed this method of obtaining advice from the FPC: "The fact that the Federal Power Commission is not itself authorized to award damages does not disable it from advising a court on questions on which its judgment is needed."

Obviously, if the FERC possessed "exclusive jurisdiction" to interpret tariffs, there would be no need for a "primary jurisdiction" doctrine to determine whether matters should be referred to the agency. Yet the FERC itself frequently *declines* to exercise primary jurisdiction, leaving tariff interpretations to courts or state agencies. This Court approved the FERC's decision not to interpret a contract in *Arkansas-Louisiana Gas Co. v. Hall*, 453 U.S. 571, 573 (1981). There, the FPC at first applied its then-existing "policy against assuming jurisdiction over matters pending before a court. . . . " *Id.* at 575 n.4. After an appeal

and remand, it declined again to exercise its jurisdiction, holding that the interpretation of a "most favored nations" clause in a FERC-filed contract required no special agency expertise. *Id.* at 575; *Arkansas-Louisiana Gas Co. v. Hall*, 7 F.E.R.C. ¶ 61,175 at 61,322-23 (1979). Thus, the FERC declined to question the Louisiana Supreme Court's interpretation of the contractual provision. This Court saw "no reason to disagree" with the determination "that interpretation of the favored nations clause raises only questions of state law." 451 U.S. at 579 n.9.

More recently, the FERC has often declined invitations to invoke primary jurisdiction. *See Portland General Electric Co.*, 72 F.E.R.C. ¶ 61,009, 61,021-022 (1995) (breach of power sale contract should be heard in Oregon courts); *Schuylkill Energy Resources, Inc. v. Pennsylvania Power & Light Co.*, 81 F.E.R.C. ¶ 61,056, 61,278 (1997) (FERC declines to exercise jurisdiction on the transmission and purchase obligations contained in a power purchase agreement because the FERC does "not possess special expertise in this particular subject matter"). Only two years ago, in *PPL Montana, LLC,* 96 F.E.R.C. ¶ 61,313 (2001), the FERC declined to exercise jurisdiction over whether a service agreement was breached because whether one party "is scheduling more power than permitted under its Agreement ... is simply not a question central to the Commission's regulatory responsibilities." *Id.* at 62,208. Billing for more capacity than permitted, of course, is just what Entergy did in this case.

The FERC not only defers contract issues to state courts, but has indicated a willingness to defer these issues to state public service commissions. In *Public Service Co. of New Hampshire v. New Hampshire Elec. Coop., Inc.*, 55 F.E.RC. ¶ 61,028 (1991), the FERC referred

to its "'normal'" practice of declining "to assert jurisdiction over billing and metering disputes turning on the application of state contract law." *Id.* at 61,078. It said:

> Because the Cooperative's right to a set-off purportedly derives from its contractual rights under New Hampshire law, instead of the Federal Power Act or this Commission's precedent, a more appropriate forum for the adjudication of this claim is the New Hampshire courts *or the New Hampshire Commission*.

Id. at 61,079 (emphasis added). In that case, the seller claimed underpayments under a contract, but the language applies just as well to suits for the collection of overpayments.

Given this mountain of authority, the claim that the FERC possesses "exclusive" jurisdiction to interpret and enforce contracts has no basis. Paradoxically, ELI and the United States support this assertion of exclusive jurisdiction only by citing an isolated statement *from the very order they seek to overturn*. [ELI Br. at 15; U.S. Br. at 19]. The "exclusive" jurisdiction predicate forms the basis for their argument, although they must know it is incorrect. Thus, these parties evade confronting their true request – that the Court overturn 80 years of precedent. This evasive approach cannot provide a basis for making constitutional law.

Nor could ELI and the *amici* validly contend that this case presents an issue requiring the exercise of the FERC's primary jurisdiction. In declaring ERS units available, Entergy did not even follow the *process* outlined in the tariff; any reasonable person can see that on the face of the minutes. Nor did Entergy consider the factors prescribed by the FERC or record its analysis of those factors.

Drawing this conclusion does not require the FERC's specialized expertise.

The terms of the FPA and the history of contract enforcement establish that the FERC has no "exclusive" jurisdiction over contract disputes. The FPA authorized the FERC *to go to court* to enjoin "a violation of the provisions . . . of any order" issued under the Act. 16 U.S.C. § 825m. It gave the FERC no enforcement authority. The authority since *inferred* by the FERC does not displace the jurisdiction of courts to decide contract disputes and it cannot preempt the authority of state commissions to consider the terms of contracts in establishing retail rates.

The Court has recognized that "[t]he regulation of utilities is one of the most important of the functions traditionally associated with the police powers of the States." *Arkansas Elec. Coop. Corp. v. Arkansas Public Service Comm'n*, 461 U.S. 375, 377 (1983). Congress passed the FPA in an effort to augment state regulation; it was designed as "a complement to and in no sense a usurpation of State regulatory authority. . . . " H.R. REP. No. 74-1318, at 8 (1935). Since the "critical question in any pre-emption analysis is whether Congress intended that federal regulation supersede state law," the Court should not expand the FPA to displace the LPSC's traditional authority. *Louisiana Pub. Service Comm'n v. FCC*, 476 U.S. 355, 369 (1986).

The FERC has no "exclusive" jurisdiction over contract disputes. In relying on the "exclusive" jurisdiction theme, ELI and the *amici* rest their arguments on an incorrect premise. Therefore, their conclusions are untenable and should be rejected.

B. The *Nantahala* and *MP&L* Cases Deal With the FERC's Exclusive Jurisdiction to Establish Tariffs, Not the Shared Jurisdiction of Enforcement, and Have No Application Here.

Because of the absence of authority to support their claim that the FERC has "exclusive" jurisdiction to interpret tariffs, ELI and the United States rely most heavily on cases dealing with the FERC's exclusive jurisdiction to establish just and reasonable rates. Neither of these cases – *Mississippi Power & Light v. Mississippi ex rel. Moore*, 487 U.S. 354 (1988), nor *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953 (1986) – involved a claim that a utility breached the terms of a contract filed with the FERC. Instead, both involved efforts by state agencies to disallow costs assessed in compliance with FERC tariffs, based on grounds that were actually decided or could have been decided by the FERC in establishing the just and reasonable rate. The Court understandably required that the state agencies pass through to ratepayers the costs assessed *in compliance* with the FERC tariffs, but these decisions hardly support giving preemptive effect to charges assessed *in violation* of FERC tariffs. Indeed, extending *MP&L* and *Nantahala* to prevent state agencies from disallowing costs assessed in breach of federal law would turn them inside out.

In *MP&L*, the Court determined that a state agency could not disallow costs as imprudent that were included in a tariff approved by the FERC, even if the prudence issue was not actually litigated at the FERC. That decision is eminently reasonable, because a determination that rates are "just and reasonable" necessarily means the costs included in the rate are reasonable. Any claim that the costs are imprudent would have to be raised at the

FERC, which has exclusive jurisdiction to alter or approve the rate. Thus, the Court emphasized that the prudence issue was a matter to be determined in establishing the rate, and the state action effectively "challenge[d] the reasonableness of FERC's allocation." 487 U.S. at 374, 375-76. In holding that a state must pass through costs assessed in compliance with a tariff, the Court also implied that a state agency may *not* pass through an overcharge assessed in violation of a FERC cost allocation: "FERC-mandated allocations of power are binding on the states, and states must treat these allocations as fair and reasonable when determining retail rates." *Id.* at 371.

Similarly, *Nantahala* required a state commission to accept an allocation of power mandated by the FERC, but it did not require acceptance of an over-allocation imposed by a parent in violation of the clear terms of the tariff. The key finding in *Nantahala* was that "Nantahala could not have treated itself as having access to any more low-cost entitlement power than it is eligible to include under FERC's interpretation of what would be a fair allocation." 476 U.S. at 972-73. Thus, the state was required to respect the utility's obligation to comply with the tariff.

Both *MP&L* and *Nantahala* upheld the FERC's exclusive jurisdiction to *establish* just and reasonable rates. They do not deal with issues of tariff compliance, over which the FERC does not have exclusive jurisdiction. This distinction was recognized by this Court in *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571 (1981). In that case, a natural gas seller brought an action in state court to enforce a favored nations clause in a gas sales contract that gave the seller the right to collect the highest gas price paid by the buyer to any supplier. The seller, which had been receiving for years the original negotiated rate

that was on file with the FERC, brought suit when it discovered that the buyer had been paying more to another supplier. The Louisiana Supreme Court awarded damages to the seller in the amount of the difference between the FERC-filed rate and the higher rate paid to the alternate supplier. This Court held that the Louisiana Supreme Court was the appropriate authority to interpret the natural gas contract, but that the filed-rate doctrine precluded the state court from awarding damages, based on a rate different from that filed with the FERC. *Id.* at 584-85. The Court thus affirmed the Louisiana Supreme Court's interpretation of the contract and all other aspects of its ruling except the damage award, to the extent it conflicted with the FERC-filed rate. *Id.*

In holding that the state court has the authority to interpret and enforce the contract, this Court recognized that state court interpretations of tariffs do not violate the filed-rate doctrine. The Court discussed *Pan American Petroleum Corp. v. Superior Court of Del.*, 366 U.S. 656 (1961), which stands for the proposition "that a state rather than a federal court was the proper forum in which a buyer should bring a breach-of-contract action to obtain a refund of charges in *excess* of the filed rate." 453 U.S. at 582 n.12 (emphasis in original). The Court reaffirmed that principle: "Permitting that action in no way contravened the filed-rate doctrine; in fact, it furthered the doctrine's purpose." *Id.*

The efforts of ELI and the United States to apply the "no choice" rationale of *Nantahala* to support preemption also pervert the Court's reasoning. [ELI Br. at 34; U.S. Br. at 25]. In *Nantahala*, the Court ruled that a state agency might permissibly challenge a utility's choice to acquire an excessive quantity of power at a FERC-filed rate, but it

could not do so when the FERC decision dictated the quantity to be purchased. 476 U.S. at 972-73. In other words, the FERC allocation left the utility with "no choice." That ruling can hardly be applied to the parent-subsidiary arrangement, where the parent's overcharge to the subsidiary leaves the subsidiary with "no choice" but to accept the overcharge. The *parent's decision* to deviate from the tariff necessarily involves an affirmative, and illegal, "choice."

Of course, ELI's "no choice" argument is ironic here, since Entergy told the FERC and the United States Court of Appeals for the District of Columbia that its operating companies required an "incentive" to obey the wishes of the parent. *Louisiana Pub. Service Comm'n v. FERC*, 174 F.3d 218, 225-27 (D.C. Cir. 1999). Now the same operating companies supposedly have "no choice" but to accept Entergy's illegal overcharge of costs. Obviously, the current version of intercorporate discipline reflects the true relationship, but the fact that a parent gives "no choice" to the subsidiary does not vest the parent with federal preemptive power.

Additionally, even a utility subsidiary with "no choice" to defy a parent has a duty, under the prudence standard, to act reasonably to minimize costs to customers. Any independent utility, faced with an overcharge from a supplier under a contract, would refuse to pay the bill. This refusal would not reflect a "parochial" view of the contract, but a legitimate interest in enforcing its terms. Similarly, ELI had a duty to enforce the System Agreement. The fact that Entergy compelled ELI to pay the excessive charge does not absolve ELI of the duty to act prudently. A utility must act reasonably to minimize costs, because "only the utility, and not the ratepayer, is in a

position to minimize imprudence and maximize efficiency. . . . " *Gulf States Utilities Co. v. Louisiana Public Service Comm'n*, 689 So. 2d 1337, 1346 (La. 1997).

MP&L and *Nantahala* preempted state authority based on the FERC's jurisdiction to establish just and reasonable rates. They do not preempt state authority to determine whether utilities have complied with FERC tariffs. Therefore, these cases do not provide a basis for overturning the LPSC's decision.

C. The LPSC's Decision to Disallow an Excessive Affiliate Allocation Was an Appropriate Exercise of the State's Regulatory Function and Does Not Illegally "Trap" Costs.

The LPSC's disallowance of the excessive charge for ERS capacity was an appropriate exercise of its regulatory authority and does not illegally "trap" costs. Entergy violated its FERC tariff in overcharging ELI for capacity under Service Schedule MSS-1. Disallowing the overcharge may deny costs to the utility, but that is no different from the consequence of any regulatory ruling that a parent overallocated costs to an affiliate. Costs are "trapped" for preemption purposes only when a state agency denies recovery in retail rates of costs imposed under a FERC tariff. Therefore, the LPSC's Order does not offend the Supremacy Clause.

The LPSC is empowered under the Louisiana Constitution to exercise plenary authority over the rates and service of public utilities. La. Const. Art. IV, § 21. This mandate requires the LPSC to examine the propriety of affiliate transactions. La. R.S. 45:1176. The LPSC often reviews affiliate transactions because holding companies

have incentives to push costs into the regulated arena and into jurisdictions that conduct frequent cost of service reviews. This action permits the prompt recovery of excessive cost allocations from retail ratepayers, while increasing profits in the company's unregulated operations or in jurisdictions where rates are not frequently reviewed.

The LPSC uses many of the tools created by the FPA and PUHCA in regulating affiliate transactions. Deviations from FERC-prescribed accounting practices may signal an improper assessment of costs. The utility's selection of inappropriate cost allocation methods from among those filed with the Securities and Exchange Commission may indicate an effort to funnel costs into certain jurisdictions. And here, the tariff approved by the FERC provided a basis for evaluating the utility's cost allocation, an allocation that overcharged ELI for unavailable capacity.

The Court's decisions in *MP&L* and *Nantahala* recognize the power of state agencies to interpret and apply FERC-filed contracts. In both cases, the Court required the state agencies to increase retail rates to pass through costs assessed in compliance with those tariffs. This directive necessarily implies determining what the tariff requires. *MP&L*, 487 U.S. at 373 (Mississippi PSC must allow recovery of cost incurred in paying "FERC-determined wholesale rate for FERC-mandated allocation of power."). If state agencies may determine what a FERC-filed contract requires, they can also determine what it forbids.

This exercise of jurisdiction accords well with the purpose of the FPA; indeed, the FERC-approved tariff in this case performed a function intended by Congress. Congress passed the FPA "to aid the state commissions in

their efforts to ascertain and fix reasonable charges." H.R. REP. No. 74-1318, at 8 (1935). In doing so, Congress recognized and affirmed the "responsibilities of state regulatory commissions" in regulating the retail impact of holding company transactions. *Id.* Here, the FERC's establishment of the new tariff requirements provided the LPSC with the standard for determining the appropriateness of Entergy's System Agreement billings. Judged against that standard, Entergy's cost assessment overcharged ELI and would have impermissibly harmed retail ratepayers.

Entergy was supposed to follow a process before including an ERS unit in MSS-1, but did not; it was supposed to consider specific criteria for counting the units "available," but did not; it was supposed to record the reasons showing how it considered these criteria in minutes, but did not. [Resp. App. at 12-15; Pet. App. at 53a, 74a]. Thus, the ERS units were not eligible for inclusion in System Agreement billings. In disallowing the overcharge, the LPSC performed a necessary regulatory task. The disallowance did not "trap" costs in the preemption sense, because the overcharge exceeded the costs that could be assessed under the FERC-approved tariff. The LPSC passed through all the costs that were validly billed to ELI, so it could not have "trapped" any costs.

ELI does not claim that it complied with the tariff, but it does offer a half-hearted argument that the FERC granted Entergy discretionary authority to ignore the process that the tariff requires. [ELI Br. at 38]. Thus, says ELI, the idea that Entergy must actually obey the tariff rests on "formalistic distinctions that have no substance." [*Id.* at 37]. Apparently ELI believes that the FERC's assurances that the tariff amendment would deny Entergy

"unfettered discretion" were offered with a wink. [Pet. App. at 152a, 154a]. But Entergy itself argued that the tariff would curb the Operating Committee's discretion, and both Entergy and the FERC urged this position in the court of appeals. The court accepted that contention, holding that the tariff did not delegate too much discretion to Entergy. *Louisiana Pub. Service Comm'n v. FERC*, 174 F.3d 218, 231 (D.C. Cir. 1999). After all that, Entergy's decision to flout the tariff's requirements can only be deemed a stark violation of federal law.

Additionally, ELI had remedies if it believed the LPSC's interpretation was erroneous. It could have appealed the finding of a tariff violation in the state courts, and ultimately to this Court, but it chose not to do so. It could have instituted a declaratory order proceeding at the FERC to seek a favorable interpretation of the contract, as Arkansas Louisiana Gas Co. attempted in *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 579 n.9 (1981). Instead, ELI allowed the LPSC's finding of a tariff violation to become final. Given that finding, there can be no impermissible "trapping" of costs.

Charges assessed by a parent to an affiliate in violation of a FERC tariff cannot be "trapped" by a state agency in the sense used in *Nantahala* and *MP&L*. Indeed, imposing these costs on ratepayers would impose a "reverse trapping," in which the Supremacy Clause is misused to legitimize utility overcharges. The Court should not approve the requests to adopt this inverted view of the preemption doctrine.

II. THE NEW RULE OF "PRESUMPTIVE UTILITY PREEMPTION" PROPOSED BY ELI AND THE *AMICI* WOULD SUBVERT THE INTENT OF THE FEDERAL POWER ACT AND IMPROPERLY HANDCUFF STATE REGULATORS.

The core request of ELI and the *amici* is revealed in their briefs, although it is lightly camouflaged. They seek a new rule of presumptive preemption for sellers of wholesale electric service, which would require state agencies to accept and buyers to pay contract overcharges until they obtain relief at the FERC. Thus, ELI asserts that the LPSC should be presumptively bound by "determinations that the System makes," the United States contends that Entergy's determinations are "presumptively lawful" even when they facially violate the tariff, and EEI advocates a "bright line" in which decisions of privately-owned "regional entities" should carry the preemptive force of federal law. [ELI Br. at 38; U.S. Br. at 13; EEI Br. at 23]. If granted, these requests would pervert the FPA, burden state regulators, and unduly harm consumers.

Congress passed the FPA to curb abuses of holding companies, not to empower those entities. The FPA was part of the Public Utility Act of 1935, a law enacted because holding companies had engaged in many affiliate abuses that injured consumers and frustrated state regulatory efforts. S. REP. No. 74-1903, at 2 (1935). Thus, Congress declared that the national interest is adversely affected:

> When subsidiary public-utility companies are subjected to excessive charges for services, construction work, equipment, and materials, or enter into transactions in which evils result from an absence of arm's-length bargaining or from restraint of free and independent competition;

> which service, management, construction, and other contracts involve the allocation of charges among subsidiary public-utility companies in different States so as to present problems of regulation which cannot be dealt with effectively by the States.
>
> 15 U.S.C. § 79a(b)(2).

Congress adopted the Act to facilitate state regulation where it was permissible under *Attleboro*. Congress imposed "Federal regulation only over those matters which cannot effectively be controlled by the States," and removed from the bill "every encroachment upon the authority of the States." S. REP. No. 74-621, at 18 (1935). Congress pursued a policy "to assist the States in the exercise of their regulatory powers, but not to impair or diminish the powers of any State commission." S. REP. No. 74-621, at 48 (1935).

The regulation of affiliate transactions is a traditional aspect of state utility regulation. The Public Utility Act of 1935 recognized this traditional state role and enacted tools, such as uniform accounting requirements, to prevent holding companies from frustrating state efforts to curb their abuses. The authorization to the FPC to establish just and reasonable rates for wholesale electric sales further facilitated this effort by regulating the terms on which sales could be made and providing a benchmark against which state regulators could assess the sellers' charges.

Against this background, the requests that the Court accord presumptive validity to sellers' billings under FERC-filed contracts would subvert the intent of the Act. Entergy, like other holding companies, has one all-consuming goal: to maximize its profits. For Entergy, avoiding disruptions in System Agreement payments that

might provoke retail rate cases has been a primary goal for two decades. Entergy offered other rationales at the FERC for its violation of MSS-1 from 1986-97, but an executive admitted that a primary purpose was to stabilize payments and "avoid the initiation of rate cases by state regulators." *Louisiana Pub. Service Comm'n v. FERC*, 174 F.3d 218, 229 (D.C. Cir. 1999). The same motive existed when Entergy violated the amended tariff in this case. But corporate profit maximization was not a goal of the FPA, nor could Congress have intended to grant holding companies the power to overcharge customers in the pursuit of that objective.

Additionally, the request for a new rule of "utility preemption" would severely hamper state agency efforts to regulate affiliate power transactions. Already, state agencies operate with limited staffs and preapproved budgets; faced with a tariff violation by a parent, they may be unable to pursue a complaint case at the FERC. In cases where a violation produces an overcharge in the test year that is relatively small – say less than $1 million – the cost and obstacles associated with a FERC proceeding may make it impractical to pursue a complaint. The newly-confected preemption rule would simply require that abusive charges be passed through to ratepayers.

Even when a utility imposes a large overcharge on an affiliate, compelling the state agency to pursue a case at the FERC, the likelihood of prompt relief is slim. First, the utility parties to the contract undoubtedly would oppose the complaint, using resources that are often unavailable to state regulators. Second, the FERC may not hear the case, at least in any reasonable amount of time. Indeed, the FERC today is consumed with fashioning new regulatory policies and often ignores even those complaint cases

it is statutorily bound to decide. As the Delaware Municipal Electric Corp. recently stated in comments concerning the FERC's proposed Standard Market Design: "The Commission's behavior and procedure with respect to complaints especially by customers have been disappointing. Sometimes, the Commission, especially its Staff, views the complaints filed with the Commission as a nuisance and waste of the Commission's resources." Comments by Delaware Mun. Elec. Corp., Inc., Docket No. RM01-12-000, ¶ 37 (Nov. 15, 2002).

The extent of the difficulty that would face a state agency may be illustrated by reference to the history of a FERC Complaint Case filed by the LPSC. In 1995, the LPSC alleged that the Entergy System Agreement was discriminatory for its failure to provide credit for interruptible loads in allocating capacity costs, contrary to FERC precedent. The FERC delayed acting on the complaint for more than a year, dismissed it, and then delayed acting on the obligatory application for rehearing for about a year. On appeal, the dismissal was reversed as "quintessentially arbitrary and capricious" by the United States Court of Appeals for the District of Columbia Circuit. *Louisiana Pub. Serv. Comm'n v. FERC*, 184 F.3d 892, 897 (D.C. Cir. 1999). After a remand from the court of appeals, the FERC again delayed acting for more than a year. When the LPSC sought mandamus relief in the court of appeals, the FERC suggested that it had discretion to delay hearing the case for *four to ten years*. FERC Response at 6 n.1, *Louisiana Pub. Serv. Comm'n v. FERC*, No. 97-1661 (D.C. Cir.). The court of appeals denied the writ of mandamus, and the LPSC was forced to seek mandamus relief in this Court. *Louisiana Pub. Serv. Comm'n v. FERC*, No. 00-405. Only at that point, in late 2000, did the FERC set the case for hearing. An ALJ

issued an Initial Decision in 2001, but the matter is still awaiting decision before the FERC, eight years after it was filed.

Granting preemptive power to utilities would carry other adverse consequences for retail regulators. Even when a utility correctly calculates charges under a FERC tariff, state agencies often must adjust the manner in which the utility seeks to collect the cost in retail rates. Entergy has a history, for example, of portraying its wholesale purchases as "all energy" and trying to pass them through retail fuel adjustment clauses. But purchases made to meet peak demand should be split into a "capacity" component, recoverable in base rates, and an "energy" component, recoverable through the final clause. Otherwise the utility would obtain a double recovery of the capacity component, since base rates already provide an allowance for capacity charges. *See Ex parte Entergy Louisiana, Inc. and Entergy Gulf States, Inc.*, Order No. U-24889, 2000 La. PUC LEXIS 223 at *22-*37 (La. P.S.C. 2000). If utilities had presumptive preemptive power in determining what FERC tariffs require, these adjustments would also be in jeopardy.

Additionally, the rule proposed by ELI and its *amici* would funnel *all* litigation to the FERC. Because these parties seek to transplant the "exclusive jurisdiction" rationale of *MP&L* and *Nantahala* into the area of tariff enforcement, they are forced to argue that *all* billing disputes under FERC-filed contracts must go to the FERC. Under this argument, the proposed presumptive validity of the seller's charge would require *all* buyers to pay first and seek relief only at the agency. This new rule would create a waiting line of immense length, burdening the FERC and interminably delaying consumer relief.

Further, the "bright line" proposal of EEI – to extend the badge of presumptive preemption to all billing decisions made by privately-owned regional transmission operators that may be created in the future – shows the potentially disastrous consequence of presumptive utility preemption. EEI predicts that regional entities will not only run the national transmission system, but will also control the wholesale power markets, effectively taking over most aspects of power production and delivery. In EEI's world, buyers would have no choice but to accept the billing decisions of the regional entity. [EEI Br. at 11]. EEI notes that future agreements will often be "subject to different interpretations," so it proposes that a regional entity's interpretations bind all buyers of service and all state commissions, unless corrected in a complaint case at the FERC. [*Id.*]

Putting aside the doubtful wisdom of making constitutional law to address potential future occurrences, the EEI proposal would invite rampant abuse of consumers. Regional transmission operators will own transmission assets or will operate them to produce profits for the owners; their motives will not include a desire to protect consumers. In some cases, utilities may have so-called "passive" ownership in transmission corporations. Regional operators may favor some buyers over others, overcharge customers to enhance profits, misinterpret contracts, misallocate costs through error, or overbill customers for other reasons. Requiring buyers and state agencies to pay these overcharges up front, and funneling all disputes to the FERC, would deny effective remedies to buyers.

The proposal of ELI and the *amici* conflicts with the purpose of the FPA. The Act was enacted to curb holding company abuses, not to infuse these companies with federal preemptive power. Therefore, the "utility preemption" request should be rejected.

CONCLUSION

The LPSC disallowed the ERS costs of ELI because Entergy, ELI's parent, violated the objective terms of a FERC tariff. This disallowance does not conflict with federal law because an overcharge does not bear the badge of FERC approval. The FPA does not grant the FERC exclusive jurisdiction to interpret tariffs and was never intended to prevent state agencies from correcting cost misallocations among affiliates. Therefore, the Court should decline the invitation to create a new constitutional rule of utility seller preemption. The judgment of the Louisiana Supreme Court should be affirmed.

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April 2, 2003

Supreme Court, U.S.
FILED
APR 21 2003

No. 02-299

IN THE

Supreme Court of the United States

ENTERGY LOUISIANA, INC.,

Petitioner,

v.

LOUISIANA PUBLIC SERVICE COMMISSION, *et al.*,

Respondents.

On Writ of Certiorari to the Supreme Court of Louisiana

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WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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INTRODUCTION AND SUMMARY OF ARGUMENT

In its Respondent's brief, the LPSC simply refuses to acknowledge the factors that establish the unlawfulness of its Order. Rather than exercise its statutory right to file a complaint before FERC, the LPSC here used its retail ratemaking authority to regulate an "area[] where FERC has properly exercised its jurisdiction to determine just and reasonable wholesale rates or to insure that agreements affecting such wholesale rates are reasonable." *Mississippi Power* v. *Miss. ex rel Moore*, 487 U.S. 354, 374 (1988) ("*MP&L*"). The LPSC did so by denying recovery in retail rates of wholesale generating costs that the FERC-approved tariff required ELI to incur and that FERC indisputably could find – and had previously found – to be just and reasonable.

In Opinion No. 415, FERC properly exercised jurisdiction over the question whether the Entergy System Operating Committee and the Entergy System (collectively "Entergy") may include ERS units in calculations of the equalization payments that ELI and its sister operating companies make to fairly allocate certain costs in this multistate system. Although FERC found that inclusion of ERS units had not been authorized by the System Agreement prior to August 5, 1997, FERC declined to order a retroactive refund because it concluded that the 23 ERS units at issue benefited Louisiana and the entire system and that the "end result" was a "just, reasonable, and not unduly discriminatory" charge. Pet. App. 161a. FERC also sought to "eliminate future disputes" by approving Entergy's proposed tariff amendment that gave it discretion to include ERS units in these calculations when it intended to return them to active service. *Id.* at 103a-104a.

After August 5, 1997, Entergy exercised this discretion by doing nothing more than continuing to calculate equalization payments by including the same 23 ERS units that FERC had already found to result in just and reasonable rates. Contrary

to the LPSC's misstatements, Entergy has maintained throughout this litigation that it fully satisfied the substantive and procedural requirements of the amended tariff and that FERC or any other neutral tribunal would so find, particularly in light of the undisputed fact that all but one of the units were quickly returned to active service. Pet. App. 6a n.4. In all events, the LPSC's allegation is only that Entergy failed to follow certain "processes" in making a substantively valid decision; and if a violation were found on such a theory, it could not be remedied by a retroactive refund. But the decisive factor is that under the terms of the FERC-approved tariff, ELI was required to make whatever equalization payments Entergy assessed – unless FERC held otherwise.

This Court's decisions thus mandated that the LPSC pass through these costs and that it pursue its objections through a FERC complaint. *MP&L*, 487 U.S. at 372; *Nantahala Power & Light Co.* v. *Thornburg*, 476 U.S. 953, 970 (1985). Instead, the LPSC denied recovery of – and unlawfully "trapped" – these costs. As the LPSC's Brief does not dispute, the LPSC further rested its disallowance on parochial grounds that are flatly inconsistent with FERC's explicit findings of system-wide benefits. Cf. Pet Br. 30-31; U.S. Br. 9-10, 29 (filed Mar. 2003); *MP&L*, 487 U.S. at 376.

In its Brief, the LPSC ignores all these facts, and disavows its and the Louisiana Supreme Court's prior statements that the Federal Power Act ("FPA" or "Act") gives FERC exclusive jurisdiction to determine if this FERC tariff has been violated. The LPSC now defends its judgment by contending that the Act gives state commissions "concurrent" jurisdiction to enforce FERC tariffs. It contends that it may disallow ELI's costs on the basis of its finding that Entergy (over whom the LPSC has no jurisdiction) violated the FERC tariff in determining the amount of ELI's equalization payments – unless and until FERC expressly rules that the charges are lawful for the precise period in question.

This rule would create all the evils that the FPA was designed to prevent, and it is foreclosed by the Act's text, structure, and history. The LPSC tries to justify its Order by relying on cases that are irrelevant or that squarely bar the LPSC's claim. In each, state law governed the resolution of specific aspects of disputes between parties to bilateral power supply contracts only because FERC had disclaimed (or was found not to have) exclusive jurisdiction over the issues.

Here, by contrast, FERC has exercised exclusive jurisdiction over all questions that affect allocations of power costs within multistate systems – whether they are characterized as matters of "prudence, interpretation . . . , or cost allocation." *MP&L*, 487 U.S. at 378-79 (Scalia, J., concurring) (quotations omitted). As the LPSC concedes, there is no issue governed by state law. The LPSC thus had no jurisdiction to resolve the federal issues under the FPA's "bright line" that divides federal and state authority.

I. THE LPSC TRAPPED COSTS THAT ELI WAS REQUIRED TO INCUR UNDER THE TARIFF.

Contrary to the LPSC's claims (Resp. Br. 43), the principles that control this case are not "new." Foremost, they are simply applications of *MP&L*, *Nantahala*, and the filed rate doctrine.

Instead of approving amended MSS-1, FERC could have required Entergy periodically to make filings that set forth the precise monthly equalization payments that were to be made among its operating companies or that listed all the ERS units and other units that were treated as "available." Had FERC done so, there is no question but that the filed rate doctrine would bar the instant disallowance. But the rate schedule that FERC approved has the same preemptive effect. Under it, Entergy is delegated discretion to make availability determinations based on consideration of certain factors, and it calculates the resulting equalization payments, with

recourse only to FERC if any party disagrees with any aspect of these determinations. Pet. App. 103a-105a; J.A. 17, 14.

Under the terms of the tariff, Entergy thus makes a centralized assessment of the equalization payments that ELI and each other operating company must make, and these assessments bind each company just as surely as if the System Agreement imposed a definite numerical charge. As the United States explained, "the filed rate doctrine establishes that the payment regime required by the System Agreement, being the equivalent of a wholesale rate structure, is reasonable as a matter of law unless FERC determines otherwise." U.S. Brief 15 (filed Dec. 2002). This payment regime means that ELI did not have any "choice" over whether to incur the charges that Entergy assessed. Thus, even if there were a basis for a finding that Entergy violated the terms of the tariff and imposed "an illegal charge" on ELI, the "filed rate doctrine" requires "state officials to accept" that charge in setting retail rates unless and until they are disallowed by FERC. *Id.* at 15 n.2 (quotations omitted).

That is the clear meaning of *MP&L* and *Nantahala*. They hold that the only situation in which a state commission can disallow a cost incurred under a FERC-approved tariff is where, as in *Pike County*, the utility was not required to incur the charge because the tariff granted the utility "the legal right to refuse to buy [] power" and to obtain the same "quantity" at a lower price from another source. *MP&L*, 487 U.S. at 374; *Nantahala*, 476 U.S. at 972-73 (citing *Pike County Light & Power Co.* v. *Pa. Pub. Util. Comm'n*, 465 A.2d 735 (Pa. Commw. Ct. 1983)). Because there is no such choice here, the LPSC's Order is invalid.

The LPSC's sole response to this argument is to misstate it. The LPSC asserts (Resp. Br. 38, 43-44) that the claim that ELI had no choice rested on the ground that a parent corporation can control its wholly-owned subsidiaries, and the LPSC claims that ELI is urging a "new rule of presumptive preemption" of holding companies' billing decisions. But

Pike County involved a sale from a parent to a wholly-owned subsidiary, and a "choice" existed there because the FERC-approved tariff gave the utility the right to cancel its contract to purchase power from its parent and to obtain power from other sources. 465 A.2d at 274-77. Thus, preemption here does not result from a parent's billings or its control over subsidiaries. It results from FERC's decision to approve a rate schedule that centralizes the administration of the System Agreement at Entergy and denies any choice to individual operating companies on the level of their equalization payments. The FERC-approved tariff thus eliminates the ability of each of five different retail ratemaking authorities to bar recovery of its utility's payments by interpreting the tariff and "finding" that Entergy violated its "objective terms." Compare Resp. Br. 38, with EEI Br. 11-12.

In this regard, contrary to the LPSC's contention (Resp. Br. 35), *MP&L* quite clearly establishes that a state commission cannot here disallow costs incurred by a retail subsidiary on the ground that its parent "breached the terms of a contract filed with . . . FERC" in assessing them. *MP&L* arose from FERC rate schedules that required MP&L to purchase 33% of the output of the Grand Gulf nuclear plant under a formula rate that was designed to recover 100% of its costs and that was administered by Entergy (then called Middle South Utilities).[1] Pursuant to this rate schedule, Entergy began billing MP&L "about $27 million" a month in Grand Gulf costs, and the Mississippi commission approved retail rates that passed through all these costs. 487 U.S. at 365-66.

The Mississippi Supreme Court reversed that order on the ground that these billings could not be reflected in retail rates unless the state commission first found them to be prudent. It directed "a complete review of the transactions between MP&L, [MSE] and MSU, and their effect on Grand Gulf

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[1] *Middle S. Energy*, 26 FERC ¶ 63,044, 65,120 (1984) (approving Grand Gulf formula rate), *aff'd*, 31 FERC ¶ 61,305, 61,657 (1985).

expense" and a determination whether the "price" charged for the power was "prudent." *Id.* at 367, 376 (quotations omitted). Among the things that the Mississippi commission could have addressed on remand was whether Entergy had violated the formula rate tariff and "overcharged" MP&L.

However, this Court reversed on the ground that the FPA categorically preempts a state from disallowing any of the $27 million in monthly Grand Gulf billings to MP&L on any ground and that a state's exclusive remedy for any claimed overcharge is a complaint before FERC. *Id.* at 375. Justice Scalia's separate opinion noted that FERC's exclusive jurisdiction extends to all questions affecting such charges within an integrated multistate system whether "'characterize[d]" as "prudence, interpretation [of the basic service agreements], or cost allocation.'" *Id.* at 378 (Scalia, J., concurring) (quotations omitted).

II. THE LPSC'S ORDER WOULD BE PREEMPTED EVEN IF THE FILED RATE DOCTRINE WERE INAPPLICABLE.

Further, the LPSC's Order would be preempted even if the filed rate doctrine were inapplicable. As the LPSC now admits, its Order can be upheld only if state utility commissions have jurisdiction to adjudicate whether Entergy violated the FERC tariff and to remedy that violation by nullifying the assessments for the only purpose for which they ultimately matter: the recovery of the costs from retail customers. But the questions of the proper interpretation of this tariff, whether it has been violated, and the remedy for any violation are matters that are within FERC's exclusive jurisdiction and are inextricably interrelated with the establishment of just and reasonable wholesale rates and cost allocations in multistate systems.

Ironically, the LPSC concedes (Resp. Br. 20) that FERC has exclusive jurisdiction to enforce just and reasonable wholesale electric rates and arrangements affecting those

rates, which are requirements of § 205(a) of the Act. 16 U.S.C. § 824d(a). However, it contends that FERC does not have exclusive jurisdiction to enforce § 205(c)'s requirement that utilities file schedules showing all charges and all classifications and practices affecting charges. *Id.* § 824d(c).

Rather, the LPSC's contention is that states and FERC have "concurrent" jurisdiction to enforce § 205(c). It claims that state commissions may – unless FERC has issued a declaratory ruling on the precise subject for the precise time in question – interpret a FERC tariff, determine that a utility's charges violate it, and refuse to pass through the resulting "overcharge" in retail rates. The LPSC maintains (Resp. Br. 44) that this concurrent jurisdiction over tariffs is confirmed by legislative history that the Act (and the Public Utility Holding Company Act) was intended to "assist" states and extend federal regulation only to matters that cannot be effectively controlled by them. It also contends that FERC and court decisions have so held. The LPSC is wrong on all counts.

A. The LPSC's Claim Is Foreclosed By The Act's Terms, Structure And History.

Sections 205(a) and 205(c) are interrelated provisions of a statute that codified earlier constitutional holdings that barred any form of state regulation of wholesale sales of electricity. Pet. Br. 22-23. Under the Act, a state commission can no more refuse to pass through a wholesale charge on the ground that it was imposed in violation of the state's interpretation of a FERC tariff than the state could do so on the ground that the rate violated the state's interpretation of the FPA requirement that rates be just, reasonable, and nondiscriminatory.

Both are matters that are on the federal side of the "bright line" between the wholesale electric services regulated by FERC and the retail electric services regulated by states. *FPC* v. *S. Cal. Edison Co.*, 376 U.S. 205, 214-15 (1964). In this regard, this Court has repeatedly rejected claims that the

legislative history of the 1935 Acts permits any role for states in assessing the propriety of wholesale transactions. *Id.* at 216; *New York* v. *FERC*, 535 U.S. 1, 6, 20-24 (2002).

The LPSC has no textual basis for its claim. Rather, the LPSC's claim rests on an attempt to draw "inferences" from limitations that Congress imposed on FERC's remedial powers that have nothing to do with enforcement of the FPA's tariff requirements.

In particular, the LPSC relies on the ground that, as originally enacted, the FPA denied FERC the power to order reparations or other forms of refunds when charges had been imposed *in conformity* with a tariff that had been properly filed and allowed to take effect without being suspended. If FERC later decided that the tariffed rates, terms, and conditions were unjust and unreasonable, its sole remedy was to order prospective changes to the tariff. See 16 U.S.C. § 824d(e); Resp. Br. 6 (citing legislative history); *Mont.-Dakota Utils. Co.* v. *Northwestern Pub. Serv. Co*, 341 U.S. 246, 256 (1951). Congress later granted FERC discretion to order refunds covering prescribed periods when it finds filed rates unlawful in complaint cases. But the LPSC asserts (Resp. Br. 27) that "FERC was given no other refund authority . . . for violations of a filed rate" and that Congress must have intended that courts and state commissions would enforce the tariff filing requirement.

This is wrong. FERC could not award reparations when tariffed rates are found unlawful because the Act's terms, structure, and history denied FERC this authority. By contrast, there never has been any limitation on the authority of FERC to order refunds or other appropriate remedies for *violations* of tariff filing requirements.[2] To the contrary,

[2] Of course, even if there were relevant limitations on FERC's remedial authority, that would not establish that states have this authority. In this regard, the *reductio ad absurdum* of the LPSC's argument is that because Congress denied reparations authority to FERC, it must have intended that

FERC had this authority by virtue of its express jurisdiction to adjudicate complaints, 16 U.S.C. § 825e, and to take all actions "necessary and appropriate to carry out the provisions of the Act." *Id.* § 825h. Contrary to the LPSC's suggestion (Resp. Br. 28), FERC's remedial authority has been broadly construed during its history (*e.g.*, *Niagara Mohawk Power Corp.* v. *FPC*, 379 F.2d 153, 157-60 (D.C. Cir. 1967)), and courts of appeals have long uniformly recognized FERC's authority to grant (or deny) refunds for tariff violations.[3]

The LPSC's claims are wrong for the additional reason that a rule that allowed states to adjudicate and remedy tariff violations is inconsistent with FERC's concededly exclusive jurisdiction to set just and reasonable rates. First, it is inevitable that states will interpret tariffs in ways that FERC would not and that state commissions would find tariff violations where FERC would not. That risk is great because tariffs in the federal power industry increasingly do not set dollar rates for units of output, but are complex formulas which are centrally administered by entities that assess charges on utilities in multiple states and that present a range of interpretative issues. See EEI Br. 19-23.

Further, ever if a charge were properly found to violate a tariff, that does not establish that there has been an "overcharge" for which a disallowance is appropriate – as FERC Opinion No. 415 illustrates. Unlike the Interstate Commerce Act ("ICA") and the Federal Communications Act ("FCA"), the FPA merely requires the filing of schedules

other tribunals have this authority. This Court rejected that claim in *Montana-Dakota Utilities*, 341 U.S. at 254. Similarly, this Court has held that even when courts have jurisdiction over matters affecting rates, they cannot order remedies that are unavailable to FERC. *See Ark. La. Gas Co.* v. *Hall*, 453 U.S. 571, 579 (1983).

[3] *See Borough of Ellwood City* v. *FERC*, 583 F.2d 642, 646-49 (3d Cir. 1978); *Belco Petroleum Corp.* v. *FERC* 589 F.2d 680, 686 (D.C. Cir. 1978); *Minn. Power & Light Co.* v. *FERC*, 852 F.2d 1070, 1073 (8th Cir. 1988); *Town of Concord* v. *FERC*, 955 F.2d 67, 72-73 (D.C. Cir. 1992).

containing rates and the practices and contracts that affect or relate to rates. The FPA does not also prohibit utilities from providing service at rates or terms that are not "specified" in the tariff (compare FCA, 47 U.S.C. § 203(c), and ICA, 49 U.S.C. § 10761(a) (1990)), and it therefore does not mandate refunds of past amounts that were unauthorized by tariffs (or collections of undercharges).[4] Accordingly, even when FERC concludes that particular charges were not authorized by the filed tariff, it can find that the charges were "just, reasonable, and nondiscriminatory" and that a refund is improper.[5] Instead, FERC can choose to remedy the violation of § 205(c) by imposing a fine or by ordering prospective changes in the tariff or some other appropriate measure.

For this reason, allowing state commissions to "enforce" tariff requirements is inconsistent with FERC's concededly exclusive jurisdiction to establish just and reasonable charges. The facts here vividly illustrate the point. FERC Opinion No. 415 found the inclusion of the 23 ERS units in ELI's equalization payments to be just and reasonable up to August 5, 1997 because, among other things, the units benefited Louisiana and the entire system. Yet the LPSC Order found the charges were unreasonable after August 6, 1997 and denied recovery of them based solely on parochial interests of Louisiana and without regard to the effect on the companies that serve other states and FERC's determination that these allocations serve the broad public interest. Pet. Br. 30-31, U.S. Br. 9-10, 12, 21-23 (filed Mar. 2003). This is precisely what the FPA was enacted to prevent. See Pet. Br. 22-23.

Finally, the LPSC's proposed rule would also lead to duplicative proceedings and litigation that ultimately would serve no purpose at all. First, the LPSC would obviously

[4] *Compare Maislin Indus., U.S.* v. *Primary Steel*, 497 U.S. 116, 130-33 (1990); *id.* at 136-37 (Scalia, J., concurring), *with Town of Concord*, 955 F.2d at 73-74.

[5] *See Town of Concord*, 955 F.2d at 72-75; *Minn. Power & Light Co.*, 852 F.2d at 1073; *Borough of Ellwood City*, 583 F.2d at 646-49.

allow the proper "interpretation" of Entergy's tariff and the appropriate remedy for a violation to be litigated in each of five affected retail ratemaking bodies. Further, under the LPSC's scheme of concurrent FERC and state jurisdiction, the LPSC admits (Resp. Br. 42) that a utility can respond to an unfavorable state order by relitigating the issue at FERC. Any decision that FERC made in review of the state order not only would be controlling, but also would allow the utility to seek retroactive relief for any illegal trapping of costs. EEI Br. 12.[6] Plainly, the more efficient, practical remedy is for FERC to have exclusive jurisdiction such that states must litigate their claims before FERC in the first instance. That is another reason the FPA drew its "bright line."

B. The FERC And Judicial Decisions On Which The LPSC Relies Are Inapposite.

The LPSC also relies (Resp. Br. 28-33) on various decisions in which courts resolved disputes by interpreting provisions of contracts filed with FERC (or tariffs filed with the FCC and ICC) or in which FERC deferred issues to court proceedings under state law. The LPSC contends that these cases establish that FERC does not have exclusive jurisdiction over tariff enforcement, that courts can enforce FERC-filed contract unless FERC asserts primary jurisdiction, and that state utility commissions can necessarily do the same.

However, to the extent these decisions are relevant, they merely reflect the reality that the FPA does not require or permit FERC to exercise exclusive jurisdiction to resolve as a matter of federal law *all* issues that arise between electric utilities and wholesale customers. While all contracts that relate to rates are filed as part of FERC schedules, there are provisions of these contracts that are *not* "rates" or "rules or

[6] Because all issues will ultimately be resolved at FERC, it is ironic that the LPSC defends its proposal by contending (Resp. Br. 45-46) that it lacks the resources to litigate at FERC and that FERC has not always been responsive to the LPSC's claims.

regulations affecting or pertaining to rates" that are subject to § 205(a)'s requirement that they be "just and reasonable" and that can be governed by state law. There also are procedural and remedial rights that exist under state law that do not implicate any substantial interest protected by § 205(a).

FERC – and courts – thus distinguish between (1) issues that are within FERC's "exclusive jurisdiction" and that other tribunals can never decide, (2) issues that are within FERC's primary jurisdiction which FERC resolves only if asked to do so, and (3) issues that are governed by state law. The FPA and Natural Gas Act ("NGA") cases that the LPSC discusses are merely applications of these principles to factual situations that are very different than those presented here.

The decisive fact here is that FERC properly exercises exclusive jurisdiction over wholesale rates and contracts allocating generating costs in integrated multistate systems. Because FERC has this jurisdiction, "the States cannot have [it]." *MP&L*, 487 U.S. at 377 (Scalia, J., concurring).

FERC Decisions. The cited FERC decisions are very clear on these points. First, when there are disputes over the amounts due under tariffs or their reasonableness, FERC asserts "exclusive jurisdiction."[7] For example, in *Northern States Power Co.* v. *Southern Minnesota Municipal Power Agency*, 55 FERC ¶ 61,101 (1991), FERC was "asked to determine the amount of compensation due [the utility]," and "[r]esolution of this dispute involve[d] determining the respective obligations of the parties under rate schedules on file with the Commission." *Id.* at 61,343. Further, there, as here, the claim was made that if the tariff did not authorize particular charges, it was unjust and unreasonable and should be reformed. *Id.* at 61,344. Citing *MP&L* and *Nantahala*, FERC rejected the argument that state courts had concurrent jurisdiction and held that FERC's jurisdiction is exclusive:

[7] *See S. Co. Servs.*, 37 FERC ¶ 61,256, 61,652 (1986); *Portland Gen. Elec. Co.*, 72 FERC ¶ 61,009, 61,021 (1995).

> [The] allegations bring the heart of the dispute between the parties within the Commission's jurisdiction under the FPA to set rates and to ensure utility practices that are just and reasonable and not unduly discriminatory. That jurisdiction is exclusive. [*Id.*]

Second, FERC asserts "primary jurisdiction" over claims that are not within its exclusive jurisdiction and that "otherwise would be subject to state court jurisdiction," *Portland Gen. Elec. Co.*, 72 FERC ¶ 61,009, 61,021 (1995), but that have been brought before FERC and are found to satisfy a three part test. See *Ark. La. Gas Co.* v. *Hall*, 7 FERC ¶ 61,175 (1979) ("*Arkla*"). Such claims are within FERC's primary jurisdiction if it possesses relevant expertise, if uniform interpretation is necessary, or if the issues are important to FERC's regulations. *Id.* at 61,322.

Third, there are issues over which FERC declines to assert primary jurisdiction and defers to state law. These are illustrated by the case that LPSC miscites (Resp. Br. 33) for the proposition that FERC defers to state court or state commission interpretations of FERC tariffs. There, FERC declined jurisdiction and deferred to state law because "[t]here [wa]s no dispute here about the amount owed . . . for services rendered under rate schedules on file with the Commission pursuant to the Federal Power Act;" rather, the only issue was whether there was a right to offset amounts owed for power sales that FERC did *not* regulate. *Pub. Serv. Co.* v. *N.H. Elec. Coop.*, 55 FERC ¶ 61,028, 61,078 (1991). The other cited decisions where FERC deferred to state law presented equally inconsequential issues under the FPA.[8]

[8] In *Arkla*, 7 FERC at 61,332, FERC declined jurisdiction because the main issue was the application of a most favored nations clause to small gas producers that FERC had ceased regulating (and FERC assumed that the filed rate doctrine would bar recovery for periods when sales were regulated). *See also Portland Gen. Elec. Co.*, 72 FERC at 61,021 (whether a utility's "acquiescence in the appointment of an official to liquidate salvageable asserts from [a plant] constitutes an event of default

Court Decisions. The LPSC also relies on two sets of cases in which courts adjudicated claims between utilities and customers. The first are FCA and ICA decisions that are simply irrelevant. The second are FPA and NGA decisions that represent applications of the distinctions reflected in the foregoing FERC decisions to quite different issues than are presented here. None of the decisions supports the LPSC's claim that state tribunals can apply federal law to resolve issues that are within FERC's exclusive jurisdiction.

FCA And ICA Decisions. The LPSC primarily relies (Resp. Br. 25, 29) on decisions that do not arise under the FPA. Rather, these are cases that arose under the quite different provisions of the ICA or the FCA and that have no relevance here.[9]

Foremost, the FCA and ICA decisions have no possible implications for the ultimate questions in this case: whether or when state utility commissions may, in the exercise of retail ratemaking authority, interpret wholesale tariffs that are regulated by FERC and enforce purported "violations" of the tariffs by preventing the pass-through of FERC-regulated costs to retail customers. This is because unlike the FPA,

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under the contract"); *PPL Mont. LLC*, 96 FERC ¶ 61,313, 62,208 (2001) (whether retail utility violated contract by scheduling more power than necessary to supply its retail customers); *Schuylkill Energy Res., Inc.* v. *Pa. Power & Light Co.*, 8 FERC ¶ 61,056, 61,278 (1997) (whether utility was contractually required to provide transmission service to a power producer selling output to third parties), *clarified by* 82 FERC ¶ 61,027 (1998).

[9] *See Great N. Ry.* v. *Merchants' Elev. Co.*, 259 U.S. 285, 288-89 (1922) (ICA); *S. Pac. Transp. Co.* v. *San Antonio*, 748 F.2d 266, 272 (5th Cir. 1984) (ICA); *Union Pac. R.R.* v. *Structural Steel & Forge Co.*, 344 P.2d 157, 160 (Utah 1959) (ICA); *Pa. R.R.* v. *Nasshorn*, 116 N.Y.S.2d 365, 365 (N.Y. App. Div. 1952) (per curiam) (ICA); *Pa. R.R.* v. *Chromcraft Corp.*, 424 S.W.2d 104, 106 (Mo. Ct. App. 1967) (ICA); *United States* v. *Garner*, 134 F. Supp. 16, 18 (E.D.N.C. 1955) (ICC); *Consol. Terminal Sys., Inc.* v. *ITT World Communications, Inc.*, 535 F. Supp. 225, 233 (S.D.N.Y. 1982) (FCA); *Nat'l Communications Ass'n* v. *AT&T Co.*, 46 F.3d 220, 223 (2d Cir. 1995) (FCA).

there is no wholesale-retail split under the FCA and the ICA. The FCA and the ICA provide federal jurisdiction over all interstate services (both wholesale and retail) and state jurisdiction over all intrastate services (both wholesale and retail). See 49 U.S.C. § 10501; 47 U.S.C. §§ 151, 152.

Second, as noted *supra* at 10, the tariff provisions of the ICA and FCA are fundamentally different than those of the FPA. Unlike the FPA, the ICA and FCA prohibit deviations from filed tariffs. Judicial proceedings under those statutes could not interfere with the FCC's or the ICC's discretion to decline to order refunds on the ground that the untariffed charges are just and reasonable because those agencies have no such discretion. Further, unlike the FCA and the ICA, the FPA authorizes tariffs that do not set numerical prices, but that flow through costs determined under formulas that utilities apply and implement. 16 U.S.C. § 824d(d).

Third, unlike the FPA, the FCA and the ICA expressly confer upon courts jurisdiction to adjudicate private actions for violations of the FCA's and the ICA's tariff requirements. Each contains an election-of-remedy provision in which a claimant can either file a complaint before the agency or bring suit in federal district court. See 47 U.S.C. § 207 (FCA); 49 U.S.C. § 9 (1970) (ICA). Courts have thus held that the FCA and the ICA must grant courts jurisdiction to enforce tariffs in some circumstances because, otherwise, the filed rate doctrine "would render meaningless" the election-of-remedy provisions that the FCA and the ICC have. *Brown* v. *MCI WorldCom Network Servs., Inc.*, 277 F.3d 1166, 1170 (9th Cir. 2002); see *S. Pac. Transp. Co.* v. *San Antonio*, 748 F.2d 266, 271 n.11 (5th Cir. 1984).

FPA And NGA Decisions. While the LPSC also cites a few FPA and NGA decisions, none supports its contention that state courts and commissions have authority to resolve disputed federal issues affecting the level of charges over which FERC has exclusive jurisdiction. In this regard, the primary decision on which LPSC relies is *Pan American*

Petroleum Corp. v. *Superior Court*, 366 U.S. 656 (1961). But the Court's holding in that case was merely that, under the well-pleaded complaint rule, state courts have *jurisdiction* over the parties' dispute if the case is pled as a state contract claim. The Court held that the question whether the FPA preempted the plaintiffs' specific claim or proposed remedy for a contractual violation is a separate question that is to be raised as a defense, and the Court there did not reach any preemption question. *Id.* at 664.

Arkansas Louisiana Gas Co. v. *Hall*, 453 U.S. 571, 580-81 (1983), held that where a court acquires jurisdiction over the parties to a dispute, it cannot award a remedy that invades FERC's jurisdiction and that rests on the premise that FERC would have approved a different rate if it had been presented with those facts. Thus, even if the LPSC had jurisdiction over Entergy – as it does not – the LPSC could not disallow ELI's MSS-1 expenses by speculating that FERC would (1) find that Entergy's assessment of these charges violates the tariff and (2) remedy the violation by ordering a refund to ELI.

The LPSC also cites lower court decisions that concluded, in a range of different factual settings, that certain state remedies would not invade FERC's exclusive jurisdiction to assure the reasonableness of wholesale rates and the practices affecting them. *Pan American Petroleum Corp.* v. *Kansas-Nebraska Natural Gas Co.*, 297 F.2d 561, 567 (8th Cir. 1962), held that the Act did not preempt enforcement of a state law contract to recover the overcharges that resulted from a Kansas law that had mandated rates ($0.11) in excess of prior contract rates ($0.07) and that was invalidated by this Court for that reason and held to be void *ab initio*. The Eighth Circuit held that courts could enforce the contract to refund the overcharges because it was not founded on any "liability created" by the NGA and because there had been no finding by the FPC that the contract was "unlawful." *Id.* Accord *Cleveland Elec. Illum. Co.* v. *City of Cleveland*, 363 N.E.2d 759, 767 (Ohio Ct. App. 1976). Whether or not these

decisions are correct on their facts, they provide no support for the LPSC's claim that it may disallow costs based on a finding that Entergy violated the FPA's tariff requirements, for that claim rests on a "liability created by the Act."

Finally, in *Gulf States Utilities Co.* v. *Alabama Power Co.*, 824 F.2d 1465 (5th Cir.), *amended by* 831 F.2d 557 (5th Cir. 1987), GSU claimed that Southern had acted in bad faith in refusing to renegotiate a contract in which it was entitled to sell specific quantities of power to GSU at prescribed rates. The Fifth Circuit held that the filed rate doctrine preempted any claim that good faith negotiation would have resulted in a lower rate, but that GSU was not preempted from claiming that a renegotiated contract would have "reduced the amount" of power GSU was required to purchase at the filed rate. *Id.* at 1471. That latter holding is inconsistent with *MP&L* (487 U.S. at 374) and *Nantahala* (476 U.S. at 374), which hold that the filed rate doctrine applies to both "price" and "quantity" terms of FERC tariffs.

But even if the Fifth Circuit's decision were correct, it provides no support for the LPSC's claim. Contrary to its assertion (Resp. Br. 29), no claim could be made that Entergy sold ELI "an excessive *quantity* of capacity at the filed rate." Availability determinations under MSS-1 do not affect the *amount* of generating capacity to which ELI has access; they determine the *price* that ELI pays for capacity to which ELI already has access as a member of the Entergy System.[10]

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[10] The Entergy System Agreement is not a bilateral contract for the purchase and sale of quantities of power at prescribed rates. It is a multilateral contract that gives each operating company the benefits of the System's generating and transmission facilities, which are centrally planned and centrally dispatched. The Agreement contains schedules (like MSS-1) that allocate or reallocate certain of the costs through equalization payments. MSS-1 thus determines the *price* that ELI pays for benefits it receives and not the *amount* of generating capacity to which it has access. Further, under MSS-1, availability determinations affect the per megawatt *rate* of payments that short companies make to long companies. In particular, availability determinations establish whether and to what extent

But all this is beside the point. As *MP&L* and Opinion No. 415 establish, FERC has properly exercised exclusive jurisdiction over allocations of generating costs within the Entergy System. Thus, the LPSC concedes that federal law governs the question whether Entergy's equalization assessments "overcharge[d]" ELI, and there is no state law issue. In this circumstance, all the FPA and NGA decisions that the LPSC cites would hold that state tribunals have no jurisdiction over the issues, and that the federal law issues must be decided by FERC.

In addition, even if these decisions established general jurisdiction in *courts* to interpret and enforce tariffs, the decisions provide no support for the LPSC's claim that it can adjudicate Entergy's compliance with the tariff in a state retail ratemaking proceeding. In all these cases, courts were able to adjudicate rights because there was a dispute between two parties to a contract and because state contract law provided the court with jurisdiction over the subject matter and the parties. State retail ratemaking bodies have no comparable jurisdiction. There is no dispute between Entergy and ELI. The LPSC has jurisdiction only over ELI and its retail rates; it has no jurisdiction over the System Operating Committee or other entities that act for the Entergy System.

III. THE LPSC'S REMAINING ARGUMENTS ARE IRRELEVANT AND ERRONEOUS.

Finally, the LPSC makes a series of arguments that are irrelevant and erroneous. First, the LPSC notes (Resp. Br. 2-5) that it (like other ratemaking bodies) has authority under state law to review affiliate transactions in setting rates, and it cites a number of cases where the LPSC did so. As this Court

individual companies are short or long. In turn, the rate per megawatt is based on the actual costs that each long company incurs in providing its own gas and oil-fired units, and these costs are different for each Entergy operating company. *See* Pet. Br. 7 n.6. The average rate per megawatt that short companies pay will thus vary depending on whether ERS units are or are not included in calculations.

has held, the equalization payments and other transactions among affiliates that occur under the Entergy System Agreement are within the exclusive jurisdiction of FERC, and states are preempted from reviewing them. *MP&L*, 487 U.S. at 376.

Second, the LPSC's Brief (pp. 10-13) alleges that the purpose and effect of Entergy's inclusion of ERS units was somehow to discriminatorily shift costs in ways that would maximize corporate profits and injure ratepayers. These are the same claims that were rejected in Opinion No. 415 and in *LPSC* v. *FERC*, 174 F.3d 218 (D.C. Cir. 1999), and they have no factual support. See Pet. Br. 9-14. This underscores that the LPSC's Staff here relitigated in a friendly forum (the LPSC) issues that it had lost in a neutral forum (FERC).

Finally, the LPSC repeatedly asserts (Resp. Br. 1, 33, 41, 42) that there here can be "no dispute" that Entergy violated the "objective terms" of the amended tariff and that the only issue is whether state utility commissions must pass through "overcharges" resulting from an established tariff violation.[11] That is nonsense. Entergy plainly satisfied the substantive requirement of the tariff that it had the "intent to return the units to service;" that is starkly confirmed by the fact that all but one of the 23 units was returned to active service or scheduled to be so returned within two years. Pet. App. 6a n.4. The LPSC's claim (Resp. Br. 1) is that, despite these

[11] The LPSC asserts (Resp. Br. 1) that the merits of the tariff violation "could not be raised in this Court because ELI litigated the contract issue before the LPSC, lost the issue, and did not appeal it." That claim is both erroneous and irrelevant. It is erroneous because Entergy expressly challenged any finding of a tariff violation in its state court appeals (*see, e.g.*, Pet. of ELI for Appeal and Judicial Review at 8, No. 458,129 (La. 19th Jud. Dist. Ct. Feb. 17, 1999); ELI Original Br. at 2-6, *ELI* v. *LPSC*, 815 So. 2d 27 (La. 2002); ELI Post-Argument Br. at 3, *id.*), and the Louisiana Supreme Court addressed this claim and rejected it on the merits. Pet. App. 19a-20a. The claim is irrelevant because the issue is whether these are matters within FERC's exclusive jurisdiction, which ELI concededly raised below.

facts, Entergy's decision was procedurally defective because Entergy purportedly failed to adhere to the "specifi[ed] process" in reaching its substantively valid decision.

But that claim, too, is baseless. Entergy's minutes recite each of the factors that the tariff required Entergy to "consider" and its conclusion, which is all the tariff requires. J.A. 33-34. Further, the materials attached to the minutes contained information relevant to each factor and supported Entergy's finding that each unit would be returned to service at some point within the next ten years. See *id.* at 35, lines 13 & 17 (projecting "operational deficits" that far exceeded the total capacity of the 23 ERS units). The LPSC objects (Resp. Br. 15) that the information on which Entergy relied was somehow insufficient and that Entergy did not specify the precise time that each unit would be returned to active service. But that fact is affected by varying costs of "short-term [energy] purchases" and other factors that cannot be readily forecast (J.A. 35, Notes: line 17). And nothing in the tariff precluded Entergy from proceeding in the way that it did, and resting its decision on what it believed was certain to occur within ten years. In short, FERC, as a neutral tribunal, could plainly find that the tariff was not violated and that, in all events, no refund is appropriate.

CONCLUSION

The decision of the Louisiana Supreme Court should be reversed.

Respectfully submitted,

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MAR 3 2003

No. 02-299

In the Supreme Court of the United States

ENTERGY LOUISIANA, INC., PETITIONER

v.

LOUISIANA PUBLIC SERVICE COMMISSION, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether a state public utility commission may prohibit an electric utility that is a member of a multi-State power system from recovering, in its retail rates, system costs allocated to the utility by an interstate tariff approved by the Federal Energy Regulatory Commission (FERC), where there has been no finding by FERC that the utility violated the federal tariff.

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INTEREST OF THE UNITED STATES

Article I, Section 8, Clause 3 of the United States Constitution provides that "[t]he Congress shall have Power * * * [t]o regulate Commerce * * * among the several States." Pursuant to that authority, Congress has charged the Federal Energy Regulatory Commission (FERC) with the responsibility of administering the Federal Power Act (FPA), 16 U.S.C. 791a *et seq.* The FPA gives FERC exclusive regulatory authority over the transmission of electric energy in interstate commerce and the sale of electric energy at wholesale in interstate commerce. 16 U.S.C. 824(b)(1). FERC is responsible for ensuring that all rates or charges made, demanded, or received by a public utility

for or in connection with such transmission or sales of electric energy are "just and reasonable." 16 U.S.C. 824d(a).

In this case, the Louisiana Public Service Commission (LPSC) determined that a public utility did not comply with the terms of a FERC-approved tariff that governs transactions between the utility and other members of a multi-State power system. Accordingly, the LPSC disallowed the utility's recovery, in its retail rates, of costs incurred under the federal tariff. That decision of the LPSC, and the Louisiana Supreme Court's affirmance of it, intrude upon FERC's exclusive jurisdiction over public utilities' interstate wholesale rates and enforcement of the particular interstate agreement at issue here. The Court's resolution of this case may affect FERC's ability to promote competition in the electric industry through regional transmission organizations whose tariffs are subject to FERC's jurisdiction under the FPA, as well as FERC's responsibility for determining whether tariffs under its jurisdiction have been violated.

At this Court's invitation, the United States filed a brief as amicus curiae in this case at the petition stage.

STATEMENT

1. a. Petitioner Entergy Louisiana Inc. (ELI) is a public utility that operates in the State of Louisiana as a wholly owned subsidiary of a multi-State holding company, Entergy Corporation (Entergy). Pet. App. 3a. Entergy owns four other operating companies in the South that, together with ELI, "plan, construct, and operate their collective electric generating and transmission facilities as a single integrated system serving parts of Louisiana, Arkansas, Mississippi, and Texas." *Ibid.* The integrated operations of the Entergy system

are governed by a FERC-approved tariff called the System Agreement. *Id.* at 3a, 4a. Article III of the System Agreement states that the Agreement "provide[s] the contractual basis for the continued planning, construction, and operation of the electric generation, transmission and other facilities of the [Entergy Operating] Companies" and the "basis for equalizing among the Companies any imbalance of costs associated with the construction, ownership and operation of such facilities as are used for the mutual benefit of all the Companies." *Id.* at 88a. The System Agreement serves, in part, "to ensure that each [operating] company contribute[s] proportionately to the total costs of generating power on the system." *Mississippi Power & Light Co.* v. *Mississippi ex rel. Moore*, 487 U.S. 354, 360 (1988).

Service Schedule MSS-1, which is included as Section 10 of the System Agreement, establishes a formula for determining each operating company's assigned share of total system power-supply capability. See Pet. App. 88a. The total system capability is the capability needed to serve total load (*i.e.*, the amount of electricity needed to serve all customers) on the Entergy system, including generation capability held in reserve to serve load in circumstances such as outages. The System Agreement makes each operating company responsible for its pro rata share of total system capability. See *id.* at 88a. Schedule MSS-1 defines each individual company's generation capability as "the sum of [the company's] available owned or leased generating units, purchases and seasonal or other energy exchanges from demonstrated reliable sources." *Id.* at 89a. Each company's capability is determined monthly. *Ibid.*

Individual operating companies almost invariably have either more, or less, actual generating capability

than they are responsible for providing under the Schedule MSS-1 formula. Pet. App. 88a. Schedule MSS-1 requires operating companies with less actual capability than their calculated share of system capability—which included ELI during the period at issue in this case—to make deficiency payments to operating companies with more actual capability than their calculated shares. *Id.* at 5a, 88a-89a.

b. This case involves ELI's deficiency payments under Schedule MSS-1 and, specifically, whether certain power-generating units in the Entergy system were "available" for purposes of Schedule MSS-1, and thus properly included when calculating the individual operating companies' power-supply capabilities. Beginning in 1987, when the Entergy system as a whole had excess generation capability, Entergy placed some of its power-generating units in an extended reserve shutdown (ERS) program. Pet. App. 41a, 90a. "Rather than disposing of units not in use, the companies kept twenty-four units on standby to have the power capacity for the future, in the event there was an increase in power demand." *Id.* at 6a. The ERS program benefitted Entergy and its customers because the program allowed the Entergy system to reduce its operating staff and maintenance costs, and to defer repair costs. *Id.* at 90a. The program "also obviated the need to build new capacity" when demand increased. *Ibid.*[1] Entergy estimated that between January 1987 and August 1994, the ERS program resulted in net savings to the multi-State system of more than $65 million. *Ibid.* Entergy's retail customers, including

[1] By 1995, many of the generating units put into ERS status had been returned to service. Pet. App. 107a, 120a.

ELI customers, generally shared in the benefit of those cost savings. See *id.* at 162a-163a & n.8.

After Entergy initiated the ERS program, its operating companies included units placed in the program as "available" units for purposes of making capability calculations under Schedule MSS-1. That treatment of the ERS units disproportionately increased some operating companies' power-supply capability, as calculated under the Schedule MSS-1 formula. As a result, ELI became liable in the relevant period for higher deficiency payments than it otherwise would have had to pay. See Pet. App. 6a, 92a n.14.

c. In December 1993, FERC initiated a proceeding under Section 206 of the FPA, 16 U.S.C. 824e, to determine whether the System Agreement permitted the treatment of generating units included in the ERS program as "available" units for purposes of Schedule MSS-1 calculations. Pet. App. 85a-86a. Respondent LPSC and other state public utility commissions were active participants in FERC's proceeding. See *id.* at 102a-103a, 105a, 108a-110a. In March 1995, an administrative law judge (ALJ) ruled that Entergy violated the System Agreement by treating ERS units as available units (*id.* at 122a-125a), but also determined not to order retroactive refunds of intra-system payments that had been made as a consequence of that treatment (*id.* at 136a-141a). In addition, the ALJ accepted a negotiated settlement proposal under which Schedule MSS-1 would be amended prospectively to allow a generating unit in ERS status to be treated as available if there is "the intent of returning the unit to service at a future date in order to meet Entergy System requirements." *Id.* at 151a-152a, 157a. The amendment provided, however, that Entergy's

> decision to consider an ERS unit to be available to meet future System requirements shall be evidenced in the minutes of the [Entergy] Operating Committee and shall be based on consideration of current and future resource needs, the projected length of time the unit would be in ERS status, the projected cost of maintaining such unit, and the projected cost of returning the unit to service.

Id. at 157a-158a (emphasis omitted).

In August 1997, FERC issued its Order No. 415 (Pet. App 85a-106a), in which it affirmed the ALJ's decision. FERC agreed with the ALJ that generating units in ERS status did not satisfy the definition of "available" units as then set forth in Schedule MSS-1. *Id.* at 99a-100a. But, like the ALJ, FERC did not order refunds of deficiency payments that operating companies had made due to the incorrect classification of ERS units. *Id.* at 101a-103a. FERC concluded that "although Entergy acted in a manner inconsistent with Schedule MSS-1, the end result was just, reasonable, and not unduly discriminatory." *Id.* at 103a. In particular, FERC determined that Entergy as a whole received no extra revenue from its inclusion of ERS generating units in Schedule MSS-1 calculations and that inclusion of the generating units removed a disincentive for individual operating companies to participate in the ERS program that reduced overall system costs and benefitted ratepayers. FERC further determined that the ERS units at issue were planned and built to serve all the operating companies collectively, and that Entergy's violation of the System Agreement was neither clear nor challenged by respondent LPSC or others until FERC initiated its proceeding. *Id.* at 101a-103a. "[T]o prevent future disputes," FERC approved the

negotiated amendment to Schedule MSS-1 that allows ERS units to be treated as available units "pursuant to specific factors." *Id.* at 103a-104a.

The LPSC and other parties filed a petition for review of Order No. 415, which the United States Court of Appeals for the District of Columbia Circuit denied. *Louisiana Pub. Serv. Comm'n* v. *FERC*, 174 F.3d 218 (1999).

2. The LPSC regulates ELI's retail rates within Louisiana. See Pet. App. 24a. The LPSC receives annual rate filings from ELI, and ELI sets its retail rates based on the LPSC's approval of those filings. *Ibid.*

In May 1997, shortly before FERC issued Order No. 415, ELI made its rate filing for 1997. Pet. App. 25a. One contested issue in the ensuing state rate proceeding was "whether ELI should be allowed to include costs of [ERS generating units] in the calculation of the reserve equalization payments under service schedule MSS-1 * * * —*i.e.*, whether these ERS units are 'available' as defined in Section 10.02(a) of the Entergy System Agreement." *Id.* at 27a. The LPSC recognized that the parties asking it to disallow ELI's deficiency-payment costs were requesting a determination that ELI "violated a FERC-filed tariff." *Id.* at 64a. The LPSC refused to make such a determination, stating that "the issue of violation of or compliance with a FERC tariff is peculiarly within FERC's purview," and "[a]ny allegation of a violation of a FERC-tariff should therefore be brought before the FERC." *Ibid.*[2]

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[2] For the period prior to the August 5, 1997, effective date of the amendment to Schedule MSS-1, the LPSC concluded that FERC's decision not to order refunds of deficiency payments made by Entergy operating companies precluded the LPSC from

Despite its recognition of FERC's exclusive authority over alleged federal tariff violations, however, the LPSC asserted in its November 1998 decision that it was *not* "precluded from reviewing the *prudence* of the [Entergy] Operating Committee's decision to incur increased costs due to the treatment of units in ERS status," or from disallowing ERS costs that it deemed imprudent. Pet. App. 65a. To support that conclusion, the LPSC stated that "FERC Order No. 415 dated August 5, 1997 does not address the reasonableness of ELI's actions subsequent to that date. Therefore, though FERC has exclusive jurisdiction over the issue of whether the System Agreement has been violated, there currently exists no FERC order that has found that the Operating Committee's decision is in compliance with the System Agreement." *Ibid.*

On that basis, the LPSC asserted that for purposes of its retail rate-setting in Louisiana, it could examine the prudence of Entergy's treatment of ERS generating units under Schedule MSS-1 and apply its own "standards for judging prudence," without violating the Supremacy Clause, U.S. Const. Art. VI, Cl. 2. Pet. App. 65a. The LPSC further found that, when deciding whether Entergy's treatment of ERS costs was prudent, it could "take judicial notice of the FERC-set standard for treating ERS units as available." *Ibid.*

Similarly, although it acknowledged that it was "bound by FERC's finding that the violation of the System Agreement did not warrant refunds" for the period prior to FERC's August 1997 approval of the amendment to Schedule MSS-1, the LPSC found it

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reviewing the reasonableness of ELI's overpayments or ordering refunds to ELI's customers in the amount of the overpayments. Pet. App. 64a.

dispositive that Order No. 415 "*did not order, prospectively*, that ELI or the other sister companies must continue to include ERS units in MSS-1 calculations, or that payments resulting from such continued inclusion are just and reasonable." Pet. App. 67a; see *id.* at 72a ("[W]hether the continued inclusion of ERS units in MSS-1 calculations complies with the amended Section 10.02 has never been addressed or decided by the FERC, and therefore no FERC order exists, with which [an LPSC] finding of imprudence could conflict.").

Having thus determined that it was not precluded from disallowing deficiency-payment costs that ELI incurred as a result of Entergy's treatment of ERS generating units under the FERC-approved System Agreement, the LPSC proceeded to examine the prudence of ELI's implementation of Schedule MSS-1. Pet. App. 73a-76a. The LPSC emphasized that its review of ELI's prudence was "guide[d]" by "[t]he impact of MSS-1 expenses on retail rates" in Louisiana, *id.* at 74a, and that its sole concerns were ELI and ELI's rates, not the "system-wide concerns relevant to FERC," *id.* at 73a. The LPSC found that the Entergy Operating Committee—which decided whether the Entergy operating companies (including ELI) would treat ERS units as available units under Schedule MSS-1—"did not exert due diligence in ascertaining the costs and benefits of bringing ERS units back to service" after taking them out of service. *Id.* at 74a.

In particular, the LPSC concluded, based on the evidence it examined concerning the manner in which the Operating Committee considered the availability of ERS units, that the Operating Committee failed to obtain sufficient information to satisfy the amended System Agreement's requirement (see Pet. App. 157a-

158a) that the availability decision shall be "based on consideration of current and future resource needs, the projected length of time the unit would be in ERS status, the projected cost of maintaining such unit, and the projected cost of returning the unit to service." *Id.* at 74a; see *id.* at 53a-54a. In the LPSC's view, ELI should have made "a more thorough evaluation" of how to minimize its own allocated share of system-wide capacity costs. *Id.* at 75a. The LPSC therefore concluded that "ELI acted imprudently in not minimizing its MSS-1 payments after August 5, 1997 when its FERC-set obligations to make those payments ceased." *Ibid.*

For those reasons, the LPSC directed that what it termed ELI's "MSS-1 overpayments"—that is, the additional deficiency payments ELI made to other Entergy operating companies as a result of the Operating Committee's treatment of the ERS units as available units on the overall Entergy system after August 5, 1997—"should be removed in setting [ELI's] 1997-1998 rates." Pet. App. 75a; see *id.* at 76a-77a. The LPSC ordered ELI to remove those intra-system payments "from the company's calculation of its cost of service" and provide its retail customers a credit based on the disallowance of those amounts. *Id.* at 77a.

3. ELI petitioned for review of the LPSC's decision in the Nineteenth Judicial District Court for the Parish of East Baton Rouge. The state district court denied the petition for review. Pet. App. 22a-23a.

On appeal, the Supreme Court of Louisiana upheld the LPSC's decision. Pet. App. 1a-21a. The Supreme Court of Louisiana stated that the LPSC was "not attempting to regulate interstate wholesale rates," and not challenging either "the validity of the FERC's declination to order refunds" or "ELI's decision to

participate in the [System] Agreement." *Id.* at 19a. Consistent with the LPSC's view, the state supreme court saw "nothing in the federal statutes or case law that prohibits the LPSC from assessing the prudence of ELI's actions" in continuing, after Order No. 415, to make deficiency payments based on the Entergy Operating Committee's treatment of ERS generating units as available units. *Ibid.* The court also determined that the LPSC's conclusion that ELI acted imprudently was supported by the record before the LPSC and was not arbitrary or capricious. *Id.* at 19a-20a.

Three Justices of the Louisiana Supreme Court dissented. Justice Kimball's dissenting opinion stated that "the LPSC is simply trying to do indirectly what it may not do directly, namely, determine that ELI violated a FERC tariff." Pet. App. 21a (Kimball, J., dissenting).

SUMMARY OF ARGUMENT

Exercising its authority under the Federal Power Act, the Federal Energy Regulatory Commission ensures just and reasonable rates for interstate transmission of electric power and wholesale sales of electric power, and prevents undue discrimination with respect to such transmission and sales. In addition, FERC serves as "a neutral body" to ensure that the competing interests of individual States do not defeat the broader public interest to be served by multi-State entities within FERC's jurisdiction. *Mississippi Indus.* v. *FERC*, 808 F.2d 1525, 1548-1549, vacated in part on other grounds, 822 F.2d 1103 (D.C. Cir.), cert. denied, 484 U.S. 985 (1987). This case implicates all of those roles. It involves an effort by a state regulatory commission, affirmed by the state supreme court, to regulate the operations of one company in a multi-State

utility system in a manner that admittedly serves only the parochial interests of that one State, without regard for the impact of the State's regulation on other companies in the system that serve customers in other States or for FERC's authority to decide what the broader public interest requires.

A. The FPA establishes exclusive federal jurisdiction over rates and charges for the transmission of electric energy in interstate commerce and wholesale sales of electric energy in interstate commerce. Public utilities must set forth, in federal tariffs filed with FERC, their rates and related terms for such transmission and sales. Congress gave FERC "plenary" regulatory jurisdiction over those rates and terms, thereby establishing "a bright line * * * between state and federal jurisdiction." *FPC* v. *Southern Cal. Edison Co.*, 376 U.S. 205, 215, 216 (1964).

B. *Mississippi Power & Light Co.* v. *Mississippi ex rel. Moore*, 487 U.S. 354 (1988), establishes that States may not regulate rates or terms of service for transmission or wholesale sales that are within FERC's jurisdiction. In those areas of exclusive federal jurisdiction, state regulation is preempted even if FERC has not yet addressed a particular regulatory question. Thus, if a State or another party disputes a public utility's compliance with its obligations under a FERC order or FERC tariff, such a challenge must be presented to FERC in the first instance.

The Louisiana Public Service Commission's "prudence" review of ELI's costs under the FERC-approved System Agreement violates those principles. As respondents agree, if ELI's costs were incurred in compliance with the System Agreement, then ELI must be allowed to recover them in its retail rates. Therefore, the LPSC's assertion of jurisdiction necessarily depended upon its determination that there was a violation of the System Agreement. But under the filed rate doctrine, rates and charges made pursuant to a FERC tariff such as the System Agreement are presumptively lawful, until FERC determines otherwise. Furthermore, FERC's determination that ERS units may be included in Schedule MSS-1 calculations after August 5, 1997, necessarily incorporated a determination that such inclusion, in compliance with the terms of the System Agreement, is prospectively just and reasonable for each Entergy operating company. The LPSC's error is especially clear because the determination to include the generating units in question as "available" was not made by ELI, but rather by the Entergy Operating Committee. Under the System Agreement, the Operating Committee's determination was made on behalf of, and binds, all of the Entergy operating companies in the multi-State system.

The fact that the LPSC nominally undertook a "prudence" review in connection with retail rate-setting, rather than expressly setting a just and reasonable level for ELI's wholesale payments pursuant to the System Agreement, does not alter the reality of the LPSC's intrusion into FERC's zone of exclusive rate-setting jurisdiction. Nor does the LPSC's disallowance of ELI's deficiency-payment costs become permissible if, as respondent has suggested, it is re-characterized as "contract enforcement."

C. The LPSC's disallowance of ELI's deficiency-payment costs is also preempted for the related reason that it "traps" costs ELI incurred under a federal tariff. Because FERC has not found a violation of the System Agreement by Entergy, the costs allocated to ELI and the other Entergy operating companies under that agreement are presently lawful under the filed rate

doctrine. The LPSC may not disallow recovery of the portion of Entergy's system capacity costs that the FERC-approved System Agreement allots to ELI's Louisiana ratepayers.

ARGUMENT

THE LOUISIANA PUBLIC SERVICE COMMISSION'S DISALLOWANCE OF COSTS ELI INCURRED UNDER SCHEDULE MSS-1 VIOLATES THE SUPREMACY CLAUSE AND THE FEDERAL POWER ACT

A. Congress Has Assigned The Federal Energy Regulatory Commission Exclusive Jurisdiction To Regulate Interstate Transmission And Wholesale Sales Of Power

Part II of the Federal Power Act, 16 U.S.C. 824-824m, closed a gap between federal and state jurisdiction that this Court identified in *Public Utilities Commission* v. *Attleboro Steam & Electric Co.*, 273 U.S. 83 (1927). In *Attleboro*, the Court held that the Interstate Commerce Clause of the Constitution, Art. I, § 8, Cl. 3, prohibited Rhode Island and Massachusetts from regulating the rates charged by a Rhode Island utility for electricity delivered to a separate utility in Massachusetts, and that only Congress could regulate that wholesale transaction across a state line. See 273 U.S. at 84, 89-90. Part II of the FPA filled the resulting regulatory void by establishing exclusive federal jurisdiction over such interstate transactions. See *New England Power Co.* v. *New Hampshire*, 455 U.S. 331, 340 (1982).

In Section 201(a) of the FPA, 16 U.S.C. 824(a), Congress "declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest." Congress further declared that federal regulation of power

generation, transmission of electric energy in interstate commerce, and the sale of electric energy at wholesale in interstate commerce, as provided in the Act, "is necessary in the public interest." 16 U.S.C. 824(a).

Section 201(b), the principal jurisdictional provision of Part II of the FPA, provides in pertinent part that the federal regulatory scheme "shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce." 16 U.S.C. 824(b)(1). Congress understood that under *Attleboro* and similar cases the States could not regulate "any wholesale [power] transaction in interstate commerce," *FPC* v. *Southern Cal. Edison Co.*, 376 U.S. 205, 213 n.8 (1964) (citing legislative history), and it therefore extended federal regulation to such wholesale sales. 16 U.S.C. 824(b)(1). Distinguishing federally regulated wholesale sales from state-regulated retail sales drew "a bright line easily ascertained" between federal and state jurisdiction. *Southern Cal. Edison*, 376 U.S. at 215.

The *Attleboro* Court also had broadly held that "[t]he transmission of electric current from one State to another * * * is interstate commerce." 273 U.S. at 86. Accordingly, and consistent with its goal of simplifying the process of deciding whether a particular transaction or event is subject to federal or state regulation, see *Southern Cal. Edison*, 376 U.S. at 214-216, Congress included in Section 201(b) an additional grant of federal jurisdiction over "the transmission of electric energy in interstate commerce," without limiting that jurisdiction to wholesale transactions. 16 U.S.C. 824(b)(1); see *New York* v. *FERC*, 122 S. Ct. 1012, 1024 (2002).

The substantive provisions of Part II prohibit, among other things, unjust or unreasonable rates or charges, and undue discrimination, "with respect to any trans-

mission or sale subject to the jurisdiction of the [Federal Energy Regulatory] Commission." 16 U.S.C. 824d(a) and (b) (FPA § 205(a) and (b)). Section 205(c) of the FPA requires public utilities to file tariff schedules with FERC setting forth their rates and terms for service, along with related contracts for service. 16 U.S.C. 824d(c). If FERC finds that a public utility's rate, or any practice "affect[ing] such rate," is "unjust, unreasonable, unduly discriminatory or preferential," it must prescribe a lawful rate or practice for the future. 16 U.S.C. 824e(a) (FPA § 206(a)).

Congress intended that the States will not regulate within the areas of federal jurisdiction specified in the FPA. The FPA and *Attleboro* "are to be read together. The latter left no power in the states to regulate [public utilities'] sales for resale in interstate commerce, while the former established federal jurisdiction over such sales." *United States* v. *Public Utils. Comm'n*, 345 U.S. 295, 311 (1953).

Because multi-State entities transmit and make their wholesale sales of electric power in interstate commerce, the rates and terms of service for such transmissions and sales must be set forth in a federal tariff filed with and approved by FERC. 16 U.S.C. 824d(c) and (d); see *United Gas Pipe Line Co.* v. *Mobile Gas Serv. Corp.*, 350 U.S. 332, 340-344 (1956) (interpreting similar provisions of the Natural Gas Act, 15 U.S.C. 717c(c) and (d)).[3] FERC's jurisdiction to regulate such sales and transmission is "plenary," based on "a bright line easily

[3] Because large portions of the Natural Gas Act "are in all material respects substantially identical" to the FPA, this Court "cit[es] interchangeably decisions interpreting the pertinent sections of the two statutes." *Arkansas La. Gas Co.* v. *Hall*, 453 U.S. 571, 577 n.7 (1981) (quoting *FPC* v. *Sierra Pac. Power Co.*, 350 U.S. 348, 353 (1956)).

ascertained, between state and federal jurisdiction, making unnecessary * * * case-by-case analysis." *Southern Cal. Edison*, 376 U.S. at 215-216. FERC's jurisdiction prevents "uncontrolled" State regulation of such transactions, which might "interfere with broader national interests." *Arkansas Elec. Coop. Corp.* v. *Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 377 (1983).

B. The LPSC's Order Is Preempted Under *Mississippi Power & Light* And The Filed Rate Doctrine

1. In *Mississippi Power & Light Co.* v. *Mississippi ex rel. Moore*, 487 U.S. 354 (1988), this Court applied the statutory provisions and jurisdictional rules described above to the operations of the same multi-State power system involved in this case. Much like the situation here, *Mississippi Power & Light* involved a state-court determination that state regulators have jurisdiction to decide that an Entergy operating company imprudently incurred costs (there, the costs of the Grand Gulf nuclear power plant) that FERC had allocated to the operating company. See 487 U.S. 357-368. The Mississippi Supreme Court's view in that case —echoed in this case by both the LPSC (Pet. App. 45a, 70a-72a, 73a-74a) and the Supreme Court of Louisiana (*id.* at 19a)—was that a state determination of imprudence "in light of local conditions" was permissible because FERC had never been presented with that issue. 487 U.S. at 368 (emphasis omitted) (quoting *Mississippi ex rel. Pittman* v. *Mississippi Pub. Serv. Comm'n*, 506 So. 2d 978, 987 (Miss. 1987)). In the Mississippi Supreme Court's view, "State regulation is not preempted provided that State regulation would not contradict or undermine FERC determinations and federal interests, or impose inconsistent obligations on the utility companies involved." 487 U.S. at 368 (em-

phasis omitted) (quoting *Mississippi ex rel. Pittman*, 506 So. 2d at 986).

This Court reversed. Relying on the "bright line * * * between state and federal jurisdiction" identified in *Southern California Edison*, 376 U.S. at 215, and reiterated in *Nantahala Power & Light Co.* v. *Thornburg*, 476 U.S. 953, 966 (1986), the Court explained that the "States may not regulate in areas where FERC has properly exercised its jurisdiction to determine just and reasonable wholesale rates or to insure that agreements affecting wholesale rates are reasonable." 487 U.S. at 374. The Court rejected "the view that the preemptive effect of FERC jurisdiction turn[s] on whether a particular matter was actually determined in the FERC proceedings." *Ibid.* It stressed that the fact that no party raises a prudence issue before FERC does *not* mean that the matter is beyond FERC's jurisdiction. *Id.* at 375. And the Court rejected, as inconsistent with FERC's system-wide approach to cost allocation, the notion that a State could properly make a prudence review of that allocation by considering only the circumstances of one Entergy operating company and its investors and ratepayers. See *id.* at 376. The Court explained that FERC's cost-allocation order "require[d] that the individual companies' needs be subsumed by the greater interests of the entire System," *ibid.* (quoting FERC order), and that the federal ruling "bar[red] a state regulatory agency from evaluating the prudence of [federally assigned costs] 'in light of local conditions' alone." *Ibid.*

The Louisiana Supreme Court's decision in this case violates the jurisdictional principles stated in *Mississippi Power & Light*. The state supreme court concluded (Pet. App. 19a) that the LPSC's disallowance of ELI's interstate deficiency-payment costs does not

intrude on FERC's exclusive jurisdiction because the LPSC considered the System Agreement's application to ELI for a period of time not specifically covered by the portion of FERC Order No. 415 that found a violation of the prior version of Service Schedule MSS-1, *before* it was amended on August 5, 1997. That reasoning, however, ignores that the *amended* System Agreement—an approved federal tariff—addresses the treatment of ERS units for purposes of deficiency payments *after* August 1997. See Pet. App. 103a-105a. As FERC noted in Order No. 415 (*id.* at 104a) and the LPSC recognized (*id.* at 64a), FERC has exclusive jurisdiction to enforce that federal tariff provision. To that end, Section 206(a) of the FPA, 16 U.S.C. 824e(a), allows any party to file a complaint with FERC alleging that existing rates are unjust, unreasonable, unduly discriminatory, or preferential. If the allegations are proved, FERC has authority to set just and reasonable rates prospectively, or remedy a violation of a tariff on file with FERC. See 16 U.S.C. 824e(a). In addition, Section 206(b) of the FPA, 16 U.S.C. 824e(b), allows FERC to order refunds for a period beginning as early as 60 days after the filing of the complaint and extending for up to 15 months thereafter. Cf. *Chicago & N.W. Transp. Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. 311, 331 (1981) (emphasizing availability of remedies under Interstate Commerce Act in holding that jurisdiction of Interstate Commerce Commission (ICC) preempted state-court damages action).

Rather than pursuing those federal remedies, the LPSC disallowed ELI's deficiency-payment costs under Schedule MSS-1 based on its own finding that Entergy did not comply with the requirements of the 1997 amendment to the Service Schedule. See Pet. App. 74a; see Br. in Opp. 1 ("[T]he Louisiana Commission's deci-

sion enforced the requirements of federal law."). Indeed, the LPSC's finding of non-compliance with the federal tariff was necessary to its rationale for asserting jurisdiction: The LPSC concedes that if the Entergy Operating Committee and ELI did comply with the requirements of the System Agreement, then ELI's deficiency-payment costs cannot be disallowed by the LPSC. See Br. in Opp. 10 (acknowledging that *Mississippi Power & Light* and *Nantahala* "preclude[] state agencies from questioning the prudence of costs assessed among affiliates *in compliance with* a FERC-approved rate"). As this Court explained in *Mississippi Power & Light*, "a state utility commission setting retail prices must allow, as reasonable operating expenses, costs incurred as a result of paying a FERC-determined wholesale price. . . . Once FERC sets [a wholesale] rate, a State may not conclude in setting retail rates that the FERC-approved wholesale rates are unreasonable." 487 U.S. at 373 (quoting *Nantahala*, 476 U.S. at 965, 966); cf. *Maryland* v. *Louisiana*, 451 U.S. 725, 749-750 (1981) (discussing, in natural gas context, States' inability to override FERC-approved interstate cost allocations).

2. Contrary to the theories adopted by the Louisiana Supreme Court and the LPSC (see Pet. App. 19a, 65a-66a), neither the LPSC's own finding of a tariff violation, nor the absence of a FERC proceeding specifically addressing the issue of a violation after August 1997, shifts the line between state and federal jurisdiction. See *Mississippi Power & Light*, 487 U.S. at 379 (Scalia, J., concurring in the judgment) (failure to seek ruling from FERC "does not take the issue out of FERC's jurisdiction and recommit it to the States."). The filed rate doctrine, which gives effect to the Supremacy Clause, "holds that interstate power rates filed with

FERC or fixed by FERC must be given binding effect by state utility commissions determining intrastate rates." *Nantahala*, 476 U.S. at 962; see *id.* at 963. Under the filed rate doctrine, FERC alone is empowered to determine that a wholesale rate is unreasonable, "and until it has done so, no rate other than the one on file may be charged." *Id.* at 964 (quoting *Arkansas La. Gas Co.* v. *Hall*, 453 U.S. 571, 581 (1981)). The doctrine, moreover, "is not limited to 'rates' *per se*," but extends to (among other things) FERC tariff filings or orders that "directly affect[] * * * wholesale rates." *Id.* at 966-967.

The principle that underlies the filed rate doctrine, and that requires reversal of the Louisiana Supreme Court's judgment in this case, is that States must "give effect to Congress' desire to give FERC plenary authority over interstate wholesale rates" and related matters, and may not issue orders that "interfere with this authority," *Nantahala*, 476 U.S. at 966, even if FERC has not yet exercised it. Such prohibited interference is precisely what occurred here, inasmuch as the LPSC has barred ELI's recovery of costs that, ELI maintains, were validly incurred when ELI made intra-system capability payments pursuant to the FERC-approved System Agreement and the Entergy Operating Committee's determination under that agreement. See *Mississippi Power & Light*, 487 U.S. at 375 ("The reasonableness of rates and agreements regulated by FERC may not be collaterally attacked * * * . The only appropriate forum for such a challenge is before the Commission or a court reviewing the Commission's order.").

Moreover, the LPSC's denial of any inconsistency between its prudence determination and Order No. 415 (Pet. App. 73a) is incorrect on its own terms. To carry

out its statutory duty of ensuring just and reasonable rates and charges within its jurisdiction, see 16 U.S.C. 824d, FERC analyzes cost-allocation agreements like the Entergy System Agreement from a system-wide perspective, rather than "in light of local conditions *alone*." *Mississippi Power & Light*, 487 U.S. at 376 (internal quotation marks omitted) (emphasis added). But that does not mean that Order No. 415 involved only "system-wide concerns," as the LPSC believed. See Pet. App. 73a. As FERC has explained in the context of another operating company's transactions with other system members, FERC's examination of system-wide costs and benefits necessarily includes some consideration of each operating company's prudence:

> [W]here, as here, the transaction involves affiliated, jurisdictional utilities, which are members of an integrated, interstate holding company arrangement, performing diverse functions on a coordinated basis, and particularly where differing interpretations are advocated concerning the parties' rights and obligations under the basic system agreements, * * * more complex, interrelated questions arise and, whether one characterizes the questions as related to prudence, interpretation, or cost allocation, they are clearly matters most appropriately resolved by this Commission as part of its overriding authority to evaluate and implement all applicable wholesale rate schedules.

AEP Generating Co., 36 F.E.R.C. ¶ 61,226, at 61,550 (1986); see *Mississippi Power & Light*, 487 U.S. at 378-379 (Scalia, J., concurring in the judgment). Thus, when FERC determined that ERS facilities could be included in Schedule MSS-1 calculations after August 5, 1997, in

accordance with the amended System Agreement (see Pet. App. 103a-105a), it necessarily determined that such inclusion was prospectively just and reasonable for each Entergy operating company. See 16 U.S.C. 824d(a) (any rate that is unjust or unreasonable is unlawful).

3. There is no jurisdictional significance to the fact that the LPSC nominally undertook a "prudence" review, rather than specifically determining that ELI's wholesale transactions with other Entergy operating companies were not just and reasonable as required by federal law, see 16 U.S.C. 824d(a). The LPSC itself conflated its prudence review with enforcement of the System Agreement's "FERC-set standard for treating ERS units as available." Pet. App. 65a; see *id.* at 65a-66a, 74a. Furthermore, this Court held in *Mississippi Power & Light* that a state prudence review, although undertaken in connection with the State's retail rate-setting, is preempted if it involves the reasonableness of FERC-regulated transactions and thus "travers[es] matters squarely within FERC's jurisdiction." 487 U.S. at 376.

Indeed, the LPSC's jurisdictional error was compounded by its review of the Entergy Operating Committee's decision about ERS generating units. See Pet. App. 73a-74a. Although the LPSC has jurisdiction over ELI's retail rates in Louisiana, the LPSC has no authority over the multi-State Operating Committee. Yet, the LPSC "review[ed] the prudence of the Operating Committee's decision" to treat ERS generating units as available units in the Entergy system as a whole, *id.* at 65a (emphasis omitted), and determined that the interstate Operating Committee failed to satisfy the requirements of the amended System Agreement, see *id.* at 53a-54a, 74a.

Contrary to the Louisiana Supreme Court's and LPSC's views (Pet. App. 15a-17a, 59a-60a, 72a, 75a), the LPSC's prudence review is not supported by *Pike County Light & Power Co.* v. *Pennsylvania Public Utility Comm'n*, 465 A.2d 735 (Pa. Commw. Ct. 1983). In *Pike County*, the Pennsylvania Commonwealth Court held that the FPA did not preempt a decision by Pennsylvania regulators to reject as imprudent a Pennsylvania utility's purchase of interstate power from a particular supplier at a FERC-approved wholesale rate. *Id.* at 736-738. The Pennsylvania court reasoned that FERC's approval of the wholesale rate addressed the reasonableness of the seller's charge from the perspective of the seller and its investors, whereas the Pennsylvania regulators addressed whether it was reasonable for the Pennsylvania utility to purchase from that supplier at the FERC-approved rate, in light of the purchaser's available alternatives. *Id.* at 738; accord *Kentucky W. Va. Gas Co.* v. *Pennsylvania Pub. Util. Comm'n*, 837 F.2d 600, 608-609 (3d Cir.) (natural gas context), cert. denied, 488 U.S. 941 (1988).

As this Court has stated, *Pike County* and similar cases involve state regulators' power to consider "the reasonableness of purchasing from a particular source of, rather than paying a particular rate for, FERC-approved power." *Nantahala*, 476 U.S. at 972. Those cases reflect that FERC generally does not regulate an individual utility's decision to purchase a particular quantity of wholesale power from one supplier, rather than another supplier, even if both purchases would be at FERC-approved rates.

By contrast, the LPSC's prudence decision in this case did not address "the reasonableness of purchasing from a particular source of * * * FERC-approved

power," *Nantahala*, 476 U.S. at 972, but rather the reasonableness of "paying a particular rate," *ibid.*, for capability deficiencies within the multi-State system, which is within FERC's regulatory domain. See, *e.g.*, Pet. App. 73a-74a (ELI "fail[ed] to exercise its discretion to limit expenses" by opposing treatment of ERS units as available units); *id.* at 77a ("ELI failed to minimize its operating costs when it decided to continue to accord MSS-1 treatment to ERS units after August 5, 1997."). Indeed, the *Pike County* rule "is meaningless" where, as here, there is no finding that the purchasing utility was able to choose between alternative sources of wholesale power. *Appalachian Power Co.* v. *Public Serv. Comm'n*, 812 F.2d 898, 903 (4th Cir. 1987); see *Nantahala*, 476 U.S. at 972-973.

New Orleans Public Service, Inc. v. *Council of the City of New Orleans*, 491 U.S. 350 (1989), on which the Louisiana Supreme Court and the LPSC also relied (Pet. App. 17a-19a, 60a-62a, 72a, 75a), likewise does not support the LPSC's assertion of state jurisdiction. In that case, the Court held that a federal district court erred when it abstained from hearing a utility's preemption challenge to a local rate order that disallowed recovery of costs of the Grand Gulf nuclear power project that FERC had allocated to the utility. See 491 U.S. at 353-358. The Court held that the state judicial proceeding was not one to which the doctrine of *Younger* abstention applies. 491 U.S. at 366-373; see *Younger* v. *Harris*, 401 U.S. 37 (1971). The utility argued as an initial matter, however, that federal judicial abstention was inappropriate even if the state judicial procedures were ones to which the *Younger* abstention doctrine applies, because the local rate order was "flagrantly" and conclusively preempted. 491 U.S. at 366-367. In the course of rejecting that argument for

overcoming *Younger*, this Court observed that the local order did not "directly * * * regulate interstate wholesale rates," "question[] the validity of" a FERC order, or reexamine issues previously decided by FERC. *Id.* at 367. But the Court did not decide whether the local rate order actually was preempted. See *ibid.* Indeed, when the Fifth Circuit determined on remand that the local rate order was not facially preempted by FERC's power-allocation orders, this Court granted certiorari, although the petition later was dismissed under this Court's Rule 46. See *New Orleans Pub. Serv., Inc.* v. *Council of the City of New Orleans*, 911 F.2d 993 (5th Cir. 1990), cert. dismissed, 502 U.S. 954 (1991).

4. At the petition stage, respondents argued that the LPSC's prudence review was permissible because it was a form of "contract enforcement," rather than "ratemaking." Resp. Br. in Reply to U.S. Amicus Br. 9. That argument is unsupported by the decisions of the Louisiana Supreme Court and the LPSC, both of which acknowledged that the System Agreement is a federal tariff subject to FERC's exclusive enforcement jurisdiction. See Pet. App. 4a, 49a, 64a. Respondent's contract-enforcement argument also is inconsistent with this Court's observation that FERC's "basic power" under its authorizing statutes is not "ratemaking" or "rate-changing," but the power to review both "rates and contracts made in the first instance by [regulated entities] and, if they are determined to be unlawful, to remedy them." *Mobile Gas*, 350 U.S. at 341. As the Court recently noted in *New York* v. *FERC*, the FPA places "subject matter," not just particular forms of regulatory action, "beyond the jurisdiction of the States." 122 S. Ct. at 1024.

FERC's exclusive jurisdiction to decide whether rates and charges for wholesale sales of power are just and reasonable therefore cannot be avoided by characterizing a reasonableness inquiry as contract enforcement. In *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246 (1951), for example, the Court determined that the FPA's establishment of exclusive federal administrative jurisdiction made it impossible for a federal district court to hear a fraud claim, in which it was alleged that wrongful dealings resulted in unreasonable wholesale rates. The "allegations of fraud[] were irrelevant" to the exclusivity of the agency's jurisdiction over wholesale rates. *Nantahala*, 476 U.S. at 963.

In *Arkansas Louisiana Gas Co.* v. *Hall*, *supra*, the Court extended the same principle to state-court determinations that effectively set wholesale rates. See *Nantahala*, 476 U.S. at 963-964 (discussing *Hall*). The state court in *Hall* had awarded damages in a breach-of-contract action between natural gas producers and a wholesale customer, after determining that its damages award resulted in an effective rate for gas that FERC would have approved if it had been filed. See 453 U.S. at 573-576, 580-581. Stressing that "Congress has established an exclusive form of regulation" and vested FERC with "exclusive authority," *id.* at 580, this Court held that the damages award was impermissible under the filed rate doctrine, *id.* at 579-582. As in this case, there was no federal order that the state court's decision specifically contradicted. See *id.* at 581 & n.11. Nevertheless, the state court's damages award "usurped a function that Congress has assigned to a federal regulatory body." *Id.* at 582. "This," the Court

concluded, "the Supremacy Clause will not permit." *Ibid.*[4]

C. The LPSC's Order Unlawfully "Traps" Costs Incurred Under A Federal Tariff

The LPSC's rate order is preempted by the FPA for the additional, related reason that it "traps" costs incurred by ELI under a lawful federal tariff. See *Nantahala*, 476 U.S. at 970-972. The consequence of the LPSC's determination that ELI was imprudent was the exclusion of ERS-based costs from ELI's retail rates. See Pet. App. 77a ("The increased MSS-1 payments resulting from the treatment of ERS units as available under Schedule MSS-1 in violation of a FERC tariff should be removed from [ELI's] calculation of its cost of service" as of August 6, 1997.); *id.* at 83a. The

[4] This Court did not question that the state court in *Hall* properly entertained the state-law contract action. See 453 U.S. at 579 n.9, 584-585. Therefore, like the *Pike County* line of cases, *Hall* illustrates that the States are not entirely disabled from considering all matters that somehow pertain to FERC-regulated power transactions, but only from taking actions that set rates or otherwise intrude upon FERC's assigned regulatory powers under the FPA. See *Arkansas La. Gas Co.* v. *Hall*, 7 F.E.R.C. ¶ 61,175 (1979) (declining to assert jurisdiction over same contract dispute because filed rate doctrine was not implicated, FERC lacked special expertise, no need for uniform interpretation, and case not important to FERC's regulatory responsibilities); see also *Pan Am. Petroleum Corp.* v. *Superior Ct.*, 366 U.S. 656 (1961) (state courts not categorically disabled from hearing state common-law claims to which defense under Natural Gas Act may be raised); cf. *Great N. Ry.* v. *Merchants Elevator Co.*, 259 U.S. 285, 294-296 (1922) (distinguishing issues of railroad tariff construction—including challenges to reasonableness of rates, rules, and practices—that require fact-finding or administrative discretion and had to be presented to ICC, from tariff issues raising pure questions of law that could be addressed by courts in first instance).

excluded costs, however, were allocated to ELI and its ratepayers pursuant to a federal tariff (*i.e.*, the System Agreement). Because FERC has not found a violation of the System Agreement, the costs allocated to ELI are presently lawful under the filed rate doctrine, and the LPSC may not prevent ELI from passing them on. See *Mississippi Power & Light*, 487 U.S. at 372. ELI must be allowed to "recover its costs of purchasing at the FERC-approved rate" that was established in presumptive compliance with the System Agreement. *Nantahala*, 476 U.S. at 970.

The State's trapping of ELI's FERC-regulated costs has implications far beyond this case. The increasingly regional nature of electricity markets and the increasing role of multi-State entities in power transmission and wholesale power sales make it particularly important that multi-State entities regulated by FERC not be subjected to inconsistent State regulation.[5] Yet under the Louisiana Supreme Court's decision, multi-State entities cannot be sure whether costs allocated by FERC will be trapped and therefore unrecoverable by the multi-State entity or its members, or shifted from ratepayers in one State to ratepayers in other States. Furthermore, because state regulatory commissions have particular concern for retail rates within their own jurisdictions, one State's disallowance of federally authorized cost-recovery could lead other States to take similar action. Those consequences are contrary to the system of exclusive federal regulation that Congress

[5] See, *e.g.*, *New York* v. *FERC*, 122 S. Ct. at 1017-1019; *Public Util. Dist. No. 1* v. *FERC*, 272 F.3d 607 (D.C. Cir. 2001) (dismissing challenges to FERC's Regional Transmission Organization rules, which promote efficiencies resulting from regional planning, construction, and operation of transmission facilities, while removing barriers to competitive wholesale energy markets).

established when it enacted the FPA, and that FERC implements through its exclusive jurisdiction to regulate transmission and wholesale sales in interstate commerce.

CONCLUSION

The judgment of the Supreme Court of Louisiana should be reversed.

Respectfully submitted.

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MARCH 2003

Supreme Court, U.S.
FILED
MAR 3 2003
CLERK

(5)

No. 02-299

IN THE

Supreme Court of the United States

ENTERGY LOUISIANA, INC.,

Petitioner,

v.

LOUISIANA PUBLIC SERVICE COMMISSION, ET AL.,

Respondents.

Petition for a Writ of Certiorari to the Supreme Court of Louisiana

BRIEF OF *AMICUS CURIAE* EDISON ELECTRIC INSTITUTE IN SUPPORT OF PETITIONER

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WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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INTEREST OF THE *AMICUS CURIAE*[1]

Edison Electric Institute ("EEI") is the national association of U.S. shareholder-owned electric utilities, their affiliates and industry associates worldwide. Its members are located in forty-nine states and the District of Columbia. They generate approximately three quarters of all electricity generated by electric companies and serve about seventy percent of all retail customers in the nation. They own about 70% of transmission system facilities in the country. EEI members are extensively regulated at both the federal and state levels.

EEI's concerns with the Louisiana Supreme Court's decision are rooted in the changes currently underway in the electric industry. In order to promote competitive multi-state markets for electricity, the Federal Energy Regulatory Commission ("FERC") is moving the industry toward regional management of the interstate transmission grid by new entities – Regional Transmission Organizations ("RTOs") – that will be regulated by the federal government. These entities are assuming significant control over both the transmission of electricity in interstate commerce and the supply of energy to satisfy consumer demand. The agreements to form and operate these RTOs will be subject to FERC rate regulation and, like the agreement among

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[1] Both parties have consented to the filing of this brief in letters lodged with the clerk. This brief was not authored in whole or in part by counsel for a party to this proceeding, and no person or entity other than the *amicus curiae* or its members made a monetary contribution for preparation of this brief. Counsel for *amicus*, Steptoe & Johnson LLP, served as counsel for petitioner Entergy Louisiana in the earlier proceedings before FERC. However, Steptoe & Johnson did not represent Entergy Louisiana in any of the proceedings below.

operating utilities in the Entergy system, will require EEI members in different states to bear significant costs. If individual state utility commissions could prevent utilities from recovering some or all of the costs assigned to them under these FERC-jurisdictional agreements, EEI members could face enormous financial hardship and FERC's efforts to promote regional electricity competition could collapse. EEI therefore seeks reversal of the decision below.

STATEMENT

A. Traditional Structure of the Electric Industry

FERC is promoting a structure for the electric industry that is radically different from the industry that existed in the past. Until fairly recently, the industry was dominated by vertically-integrated utilities that provided all three elements of the business – generation, transmission, and distribution – to customers in a defined service area. As regulated monopolies, utilities were subject to "cost of service" regulation by state public utility commissions. Each electric utility planned investments for generation and transmission in its franchised service area as a separate local unit. *New York v. FERC*, 122 S. Ct. 1012, 1016-17 (2002).

While continuing to operate as separate vertically-integrated companies, utilities began to coordinate their operations through the interconnection of their electric systems, which enabled them to share generation reserves for reliability and buy and sell electricity in order to lower operating costs.[2] In 1935, Congress enacted the Federal Power Act to regulate this growing wholesale electric

[2] *Gainesville Utils. Dep't v. Florida Power Corp.*, 402 U.S. 515, 520-24 (1971); *Pub. Util. Holding Co. Act of 1935: Hearings on S. 1725 Before the Senate Comm. on Interstate Commerce*, 74th Cong. at 798 n.1 (1935).

market, in part because the Commerce Clause prohibited the states from regulating it. *New York v. FERC*, 122 S. Ct. at 1017. The Federal Power Commission (FERC's predecessor) was given exclusive authority over wholesale bulk power sales by public utilities, while the states continued to regulate utilities' retail sales. Congress also granted the Commission exclusive jurisdiction over interstate transmission. *Id.* The wholesale/retail "bright line" served to distinguish FERC-jurisdictional service from service regulated by the states without the need for case-by-case adjudication of Commerce Clause issues. *FPC v. Southern California Edison Co.*, 376 U.S. 205, 211, 215-16 (1964).

This jurisdictional line, however, is not as bright as might appear on first impression since, by their nature, wholesale costs must become embedded in the retail rates of electric utilities. As wholesale trading expanded rapidly in the 1970s, disputes over the scope of federal versus state regulation arose. A considerable body of case law developed at the state court level, holding that states were prohibited from re-evaluating the FERC-regulated wholesale rates and disallowing those deemed unreasonable for retail ratemaking purposes. *See, e.g., Narragansett Electric Co. v. Burke*, 381 A.2d 1358 (R.I. 1977), *cert. denied*, 435 U.S. 972 (1978). This Court ultimately agreed: "a State may not exercise its undoubted jurisdiction over retail sales to prevent the wholesaler-as-seller from recovering the costs of paying the FERC-approved rate . . . . Such a 'trapping' of costs is prohibited." *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 970 (1986); *see also Mississippi Power & Light Co. v. Miss. ex rel. Moore*, 487 U.S. 354 (1988).

B. The Transition To Regional Wholesale Electric Competition

Beginning in 1995, FERC initiated a series of rulemakings designed to promote competition for the supply of electricity at wholesale by opening up the interstate

transmission grid to competing power suppliers. FERC envisioned the development of regional power markets in which power suppliers could use the transmission grid to compete on an equal basis to supply power at the wholesale level. The Commission pointed to two developments in the industry that set the stage for these rulemakings.

First, the process of system integration among utilities had accelerated, due in part to technological advances that made it possible to transmit electricity efficiently at high voltages over long distances. By 1967, "[i]nterconnections, direct and indirect, among utilities [were] a far more vital part of the industry's operations."[3] Today, virtually every utility has access to the highly interconnected transmission system. *New York v. FERC*, 122 S. Ct. at 1017-18. As FERC noted, "Physically isolated systems have become a thing of the past."[4]

Second, FERC found that a new class of wholesale suppliers – the "independent power producers" – was entering the market to compete with traditional utilities, and that these independents required non-discriminatory access to the transmission grid to be able to compete. Order No. 888, 61 Fed. Reg. at 21,545-46. In fact, a number of states encouraged utilities to rely on competitive procurement

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[3] *Federal Power Act Amendments of 1967, Hearings on H.R. 5348, H.R. 5637, H.R. 7799, H.R. 8426, H.R. 8919, H.R. 9174 Before the Subcomm. on Communications and Power of the House Comm. on Interstate and Foreign Commerce*, 90th Cong., at 118 (1967) (statement of Lee C. White, Chairman, FPC).

[4] Order No. 888, 61 Fed. Reg. 21,540, 21,545 (1995), *aff'd in part sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd jurisdictional ruling sub nom. New York v. FERC*, 122 S. Ct. 1012 (2002).

arrangements to obtain low cost power rather than building their own power plants subject to cost-based regulation.

C. The New Industry Structure

1. Order No. 888

Based on these findings, the Commission set out to remove restrictions on access to the interstate transmission grid. Under Order No. 888, FERC implemented an "open access" policy: transmission owners must provide access to their transmission networks for other users on the same rates, terms, and conditions enjoyed by the utilities themselves. Order No. 888, 61 Fed. Reg. at 21,541; *see also New York v. FERC*, 122 S. Ct. at 1019-20. All transmission owners were required to file with FERC prescribed open access transmission tariffs to achieve this result. Order No. 888, 61 Fed. Reg. at 21,541, 21,597.

However, FERC also recognized in Order No. 888 that providing access to the grid on a utility-by-utility basis might not be sufficient to permit competition to develop efficiently over broader regions because of the high cost to acquire transmission service passing through multiple systems, each charging its own rate. FERC was also concerned with what it perceived as the balkanized structure of the transmission grid. *Id.* at 21,1551, 21,595-97. Order No. 888 therefore encouraged the creation of independent system operators ("ISOs") – FERC-regulated public utilities that would have a management independent of participants in the wholesale markets. *Id.* at 21,596. An ISO would be responsible for coordinating the operation of the transmission assets owned by a number of neighboring utilities and would administer a single open access transmission tariff for these utilities. FERC approved several agreements among utilities to form ISOs following Order No. 888, including entities in the Mid-Atlantic region, New England, New York and

California. *See Atlantic City v. FERC*, 295 F.3d 1 (D.C. Cir. 2002).[5]

2. Order No. 2000

In the wake of Order No. 888, a substantial number of new participants entered the marketplace, resulting in significant growth in the volume of wholesale trading. These changes, according to FERC, "placed new stresses on regional transmission systems," as an increasing number of parties were using the grid in ways that differed markedly from the uses that prevailed before Order No. 888.[6] Whereas power flows were fairly predictable before the advent of open access, power now moved along transmission lines in unprecedented volumes and in unexpected directions under conditions for which those facilities were not designed. The interstate transmission system, the Commission observed, had thereby become vulnerable to both reliability and efficiency problems. Order No. 2000, 65 Fed. Reg. at 814.

In light of these concerns, FERC promulgated Order No. 2000. Its purpose was to advance the formation of RTOs, which have many of the same characteristics as the ISOs introduced in Order No. 888. "Our objective is for all

[5] With the exception of California, the regions that set up ISOs pursuant to Order No. 888 had already been operating as regional "power pools" in which power from generating plants was centrally dispatched by a single operator and access to the transmission grid was on a pool-wide basis. *See Atlantic City*, 295 F.3d at 4. In California, an ISO was established when the State decided to restructure its electric utilities and permit retail electric consumers to purchase electricity in a competitive market.

[6] Order No. 2000, 65 Fed. Reg. 810, 813 (2000), *pet. for review dismissed sub nom. Pub. Util. Dist. No. 1 of Snohomish County v. FERC*, 272 F.3d 607 (D.C. Cir. 2001).

transmission-owning entities in the Nation, including non-public utility entities, to place their transmission facilities under the control of appropriate RTOs in a timely manner." Order No. 2000, 65 Fed. Reg. at 811. In FERC's opinion, this structural change was necessary because the market was insufficiently competitive due to engineering and economic inefficiencies and because of continued opportunities for discrimination under Order No. 888. *Id.* at 823-25. It was also thought that RTOs would benefit the public through the introduction of regional planning and operation of the electric grid. *Id.* at 811.

Under FERC's scheme, the transmission owners in a multi-state region would transfer functional control over their facilities to the RTO through various contractual arrangements filed with FERC. FERC did not mandate a particular type of RTO structure, giving prospective RTO participants the "flexibility to develop mutually agreeable regional arrangements." *Id.* at 834. However, FERC established minimum requirements for RTOs, including minimum scope and configuration requirements so that wholesale power trading would take place in sufficiently large market areas. *Id.* at 843, 859.

Consistent with Order No. 2000, EEI member utilities are currently investing billions of dollars to make RTOs a reality. A FERC study indicates that RTO start-up costs will range from $1 billion to $5.75 billion.[7] According to other studies, the ongoing operation costs for RTOs will range from $75

[7] ICF Consulting, *Economic Assessment of RTO Policy* at vii, prepared for FERC (Feb. 27, 2002), *available at* www.ksg.harvard.edu/hepg/papers/ferc%201cf%20rtostudy_final_0226.pdf.

million to $100 million annually per RTO.[8] The annual operating budgets of some existing RTOs already exceed that amount by a significant margin. For example, the 2003 annual budget of the PJM RTO exceeds $150 million.[9] The costs to start up and operate RTOs are charged to utilities under FERC tariffs, and in order to make the utilities whole these costs must be passed through to retail customers pursuant to state-regulated retail service rates.

The formation of an RTO requires an agreement among the utility transmission owners to coordinate or "pool" their transmission operations under an RTO's effective control. These agreements are similar to the Entergy System Agreement at issue before the Court in that they are tariffs that must be filed with FERC pursuant to Section 205 of the Federal Power Act, 16 U.S.C. § 824d (2000). They are also similar in that they assign responsibility for decisions relating to the sharing of wholesale power and transmission costs to a management entity operating at the regional level, subject to FERC jurisdiction. Utilities participating in the RTOs must then recover these costs from retail customers pursuant to rates regulated by the states.

For example, the RTO formation agreements assign to the regional entities, at FERC's direction, responsibility for administering regional transmission tariffs. Under the tariffs, utilities furnishing transmission assets recover their capital

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[8] *See, e.g.*, Tabors Caramanis & Associates, *RTO West/Benefit Cost Study, Final Report Presented to RTO West Filing Utilities* at ix (Mar. 11, 2002), *available at* www.ksg.harvard.edu/hepg/papers/tabors%20ca%20bencost_031102_rtowestbcfinalrevised/pdf.

[9] *See* Approved 2003 Budget and Service Category Rates, *available at* www.pjm.com (Finance Committee).

and operating costs through FERC-regulated rates. In all states where retail services have been unbundled, utilities using the grid will be required to purchase transmission service from the RTOs under the regional tariffs at FERC-regulated rates. The utilities will then have to recover the costs of that service from retail customers via state-regulated rates.

In addition, FERC has assigned to RTOs primary responsibility for planning upgrades to the interstate transmission grid. When new facilities are constructed, the RTO will file rates at FERC to recover the costs of the upgrades from transmission users, including utilities in their roles as providers of retail service. The costs of transmission expansions assigned to utilities by the RTO, and approved by FERC, must then be charged through to retail customers via state-regulated rates for retail service.

The multi-state contracts also assign to RTOs responsibility for establishing and administering wholesale markets for power. This will require the RTOs to purchase complex computer systems – both hardware and software. In addition, the utilities will participate in the markets administered by the RTOs as buyers and sellers in order to satisfy their retail service obligations. All costs incurred by utilities in these markets to serve their retail customers will be pursuant to FERC-approved tariffs, and these costs will have to be charged through to retail customers under state-regulated rates for retail service.

3. Standard Market Design

Most recently, FERC has proposed a standard market design ("SMD") rulemaking, which it calls the "final book of

the trilogy."[10] According to FERC, the proposed rule is needed to eliminate residual balkanization on the transmission grid by standardizing the rules across regions for designing wholesale power markets and operating the transmission grid. 67 Fed. Reg. at 55,455. Under this proposed rule, all public utilities would be required to transfer operating authority over their transmission assets to an independent transmission provider, and this independent entity would be required to put in place uniform rules for both transmission service and wholesale market design. *Id.* These rules would create spot markets for power that utilities with obligations to serve retail customers would use to meet the demand for power on a day-ahead and real-time basis.

As proposed, the SMD would extend to all interstate transmission service, including transmission service that is provided as part of a bundled sale of electricity to retail customers, which previously had been regulated by the states. *Id.* at 55,468, 55,470. Therefore, the SMD would place under FERC regulation all of the charges to retail customers for the use of a utility's interstate transmission assets; billions of dollars of revenues annually would be affected. Utilities would then be required to include these charges in state-regulated tariffs for retail service.

SUMMARY OF ARGUMENT

FERC has exclusive jurisdiction to determine compliance with tariffs filed under the Federal Power Act. The LPSC conceded this point in its own decision. Here, however, it argues that it can scrutinize the prudence of a utility's costs when it determines that the utility's conduct is inconsistent

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[10] *Remedying Undue Discrimination through Open Access Transmission Service and Standard Electricity Market Design; Proposed Rule*, 67 Fed. Reg. 55,452, 55,454-55 (2002).

with the terms of a FERC-filed tariff. This ignores the basic rule that a state's "prudence review" is preempted when it traps costs incurred pursuant to a tariff on file with FERC. *MP&L*, 487 U.S. at 374; *Nantahala*, 476 U.S. at 970.

In the context of multi-state organizations, a state's prudence review will inevitably trap costs. The utilities do not act autonomously of the other utilities in the multi-state system, and do not have the authority to disregard decisions of the regional entity. If a state commission prohibits an individual utility from recovering costs mandated by the regional entity, the utility must either absorb those costs or shift them to the ratepayers of utilities located in other states. Both outcomes are preempted because they frustrate the federal scheme.

Moreover, the LPSC's position poses a serious risk of conflicting state interpretations. Decisions must be made by the management of regional entities under system agreements that do not specify simple numbers, but use formulas or other factors. Due to their complexity, these agreements are often subject to different interpretations. Decisions by one state's regulators concerning the allocation of costs or revenues pursuant to such tariffs may conflict with the decisions of other states on the same issues. Those conflicts will inevitably cause the trapping of costs. In view of the need for a uniform interpretation of the filed tariff, FERC is the proper forum to decide these multi-state battles.

This Court should therefore draw a bright line establishing that FERC has exclusive jurisdiction to interpret and enforce tariffs governing multi-state entities. A bright line approach is particularly important because of the increasingly central role of regional entities in the industry. Under FERC-regulated, multi-state agreements, RTOs will make allocation decisions involving billions of dollars for start-up costs, operating expenses and investments in the transmission grid. This new structure cannot work if those

decisions can be second-guessed by state regulators with conflicting views on the meaning of the regional agreement.

Moreover, the exception to the filed-rate doctrine created in *Pike County Light & Power Co. v. Pennsylvania Pub. Util. Comm'n*, 465 A.2d 735, 737-38 (Pa. Commw. Ct. 1983) would not authorize a state to scrutinize costs incurred by utilities in multi-state organizations. The premise of *Pike County* is that the utility had a choice to purchase power at a lower price. In the multi-state context, however, this element of choice is missing. The participant in an RTO or multi-state holding company has no choice but to follow the decision of the regional entity. The prudence inquiry is therefore impermissible because the state commission would in effect be regulating the decision of the regional entity, which is subject to FERC's exclusive jurisdiction.

The LPSC concedes that FERC's interpretation of the tariff, when given, is authoritative. The LPSC claims that it can decide whether a utility has violated a FERC tariff prior to any FERC decision on that issue. This conflicts with the approach consistently followed by this Court that, if FERC has jurisdiction, that jurisdiction is exclusive. Moreover, the LPSC's approach is impractical. The parties would have to engage in extensive litigation at the state level, subject to having the entire state decision reconsidered by the FERC. And if FERC disagrees with the state's original position, the utility would need to seek retroactive relief to become whole. Where the states have concerns about the administration of a multi-state agreement, they can pursue their remedy at FERC.

For these reasons, the decision of the Louisiana Supreme Court should be reversed. This Court should hold that only FERC can interpret and enforce the terms of the filed multi-state system agreement.

ARGUMENT

I. STATE PRUDENCE REVIEW OF ACTIONS TAKEN PURSUANT TO MULTI-STATE AGREEMENTS FILED WITH FERC WOULD FRUSTRATE THE PURPOSES OF THE FEDERAL POWER ACT

A. Under This Court's Decisions, State Prudence Review Conflicts With FERC's Exclusive Jurisdiction

FERC's jurisdiction over filed tariffs is exclusive. *Nantahala*, 476 U.S. at 966, 969; *New England Power Co. v. New Hampshire*, 455 U.S. 331, 340 (1982). Indeed, in the proceedings below, the LPSC conceded that "FERC had exclusive jurisdiction over the issue of whether the System Agreement has been violated." Pet. App. 65a. It stated:

> [T]his Commission is pre-empted from determining whether the terms of a FERC tariff have been met, for the issue of violation of or compliance with a FERC tariff is peculiarly within FERC's purview. Any allegation of a violation of a FERC-tariff should therefore be brought before the FERC.

Pet. App. 64a; *see also* Pet. App. 72a.

The LPSC nevertheless argued that Congress did not preempt the jurisdiction of Louisiana to conduct a prudence review of decisions made pursuant to the terms of a federally regulated multi-state system agreement. In the LPSC's view, it had authority to inquire into the prudence of those decisions in order to determine the *retail* costs of service. (Pet. App. 69a-72a). Thus, the LPSC asserts the right to determine whether the actions taken were inconsistent with the terms of the federal tariff.

The LPSC is mistaken. The Federal Power Act preempts inconsistent state law regardless of the source of authority. State courts are preempted from affecting FERC-filed rates by awarding damages under state contract law, *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571 (1981); state legislatures are preempted from affecting wholesale rates under their taxing powers, *Exxon Corp. v. Eagerton*, 462 U.S. 176 (1983); and a state utility commission cannot prevent regulated utilities from passing through to retail customers costs incurred under FERC-mandated wholesale rates:

> When FERC sets a rate between a seller of power and a wholesaler-as-buyer, a State may not exercise its undoubted jurisdiction over retail sales to prevent the wholesaler-as-seller from recovering the costs of paying the FERC-approved rate . . . . Such a 'trapping' of costs is prohibited.

Nantahala, 476 U.S. at 970.

The LPSC's prudence review would create precisely the sort of impermissible conflict with FERC jurisdiction that the Court prohibited in *Nantahala* and *MP&L*. In *Nantahala*, the Court reversed a decision of the state supreme court allocating costs to a utility differently from the amount allocated by FERC in a wholesale ratemaking proceeding. The Court found that costs incurred by a utility would be "trapped" unlawfully if they could not be passed on to ratepayers. *Id.* Thus, the state commission's allocation of costs was preempted as an "impermissible interference . . . with the scheme of federal regulation." *Id.*

In *MP&L*, the Court observed that "the only purpose of the prudence review ordered by the [state] was to determine whether the costs FERC had directed MP&L to pay for its allocation of Grand Gulf power should be 'trapped' or passed

onto MP&L's retail customers." 487 U.S. at 372 n.12. The Mississippi state court sought to distinguish *Nantahala* on the ground that FERC's rate order never expressly addressed the prudence of the utility's decisions. This Court rejected the notion that federal preemption turned on whether "a particular matter was actually determined in the FERC proceedings." *Id.* at 374. "We have long rejected this sort of 'case-by-case analysis of the impact of state regulation upon the national interest' in power regulation cases." *Id.*

In short, *Nantahala* and *MP&L* hold that FERC's exclusive jurisdiction is necessary to assure that legitimate wholesale costs are not trapped. A state is indirectly dictating the wholesale price when it declines to give effect to the rate adopted by the federal Commission. That dictation frustrates the federal regulatory framework established by Congress. *See Arkansas Elec. Coop. Corp. v. Ark. Public Serv. Comm'n*, 461 U.S. 375, 389 (1983) ("a particular rate set by the [state utility commission] may so seriously compromise important federal interests . . . as to be implicitly pre-empted"); *City of New York v. FCC*, 486 U.S. 57, 64 (1988) (state action that "frustrates the purposes" of federal law is preempted); *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

B. The LPSC's Prudence Review Is Impermissible Because It Results In Trapped Costs

Here, the LPSC failed to see that its order would interfere with operations under a federally filed multi-state agreement in the same way. That agreement contemplated that the Entergy Operating System would make critical decisions as a unit. An amendment to the tariff in 1997 provided a procedure for determining charges for reserved capacity, specifying standards to be applied by the Operating Committee. (Pet. App. 157a-158a). FERC approved that arrangement in a proceeding that included the LPSC's

participation.[11] Once the Operating Committee had decided whether the disputed ERS units were to be included in that calculation, Louisiana Entergy had no choice but to include costs associated with those units, since the filed tariff then in effect required that it adhere to the decision of the Operating Committee. Thus, the LPSC's refusal to allow recovery of those costs was inconsistent with the mandate of a federally filed tariff and hence preempted under the holdings of *MP&L* and *Nantahala*.

Moreover, the LPSC's decision will result in exactly the same trapping of costs forbidden by those decisions. The Operating Committee decision required Entergy Louisiana to pay a portion of the costs associated with the ERS units. The LPSC, however, held that, because Louisiana Entergy had acted imprudently, it could not pass those costs through to its retail customers. (Pet. App. 75a). In this respect, Louisiana Entergy suffers from "trapped" costs contrary to this Court's clear holdings.

Even from a broader system perspective, the same result is likely. The LPSC's decision, while reducing rates for Louisiana consumers, had the concomitant result of either forcing the Entergy system to absorb the costs entirely, or forcing those costs onto customers located in other states (Arkansas, Texas, and Mississippi). Neither outcome is permissible. The first is manifestly a trapping of costs at the system level. The second will lead to the same result. The likely response of the neighboring states to LPSC's parochial interpretation is to adopt one of their own.[12] Thus, the multi-

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[11] *See Entergy Servs.*, 80 FERC (CCH) ¶ 61,197 (1997), *aff'd, Louisiana Pub. Serv. Comm'n v. FERC*, 174 F.3d 218 (D.C. Cir. 1999).

[12] FERC has already noticed this phenomenon in an analogous context: "If State Commission A orders a change to be

(Continued ...)

state system will be caught in a squeeze between states in which it cannot fully recover its costs. Inconsistency among state regulators, just as much as inconsistency between federal and state regulators, will lead to impermissible trapping of costs.

This case illustrates the harms that may arise from the attempts of state regulators to interpret tariffs filed by multi-state entities. At issue in this case is the allocation of costs associated with reserve capacity. Reserve capacity is a resource used to meet the demand for energy when the system-wide demand is at its peak.[13] By definition, reserve capacity may not be of immediate value to each individual entity within the system. But all members of the system benefit from the greater reliability of a system that has adequate reserve capacity to meet peak demand.[14]

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made in a wholesale rate filing, presumably because it would benefit the ratepayers in State A, then State Commission B might well retaliate by ordering a counter rate filing that would benefit the ratepayers in State B." *Western Massachusetts Electric Co.*, 23 FERC (CCH) ¶ 61,025 at 61,064 (1983). *See also Middle South Energy v. APSC*, 772 F.2d 404, 416-17 (8th Cir. 1985); *Commonwealth of Massachusetts v. United States*, 729 F.2d 886, 888 (1st Cir. 1984) (Breyer, J.).

[13] *See Gainesville Utils. Dep't v. Florida Power Corp.*, 402 U.S. at 520-24; *Louisiana Public Service Comm'n v. FERC*, 174 F.3d at 221-22; *see also* Stephen G. Breyer & Paul W. Macavoy, ENERGY REGULATION BY THE FEDERAL POWER COMMISSION, at 105-07 (1974).

[14] *See Louisiana Public Service Comm'n v. FERC*, 174 F.3d at 221-22; *see also Central Maine Power Co. v. FERC*, 252 F.3d 34, 38 (1st Cir. 2001).

Because of these characteristics, the temptation is great for a state regulator to question provisions for reserve capacity under a multi-state system agreement. By focusing on the short-term interests of its own constituents, a state regulator could make a determination with regard to costs for reserve capacity that conflicts with the interests of the system as a whole. The system agreement on file with FERC, however, protects against that contingency by providing a unitary method for making this determination for the entire system. The Federal Power Act also provides all parties with the ability to seek a remedy at FERC for any action inconsistent with the filed tariff. Individual state action determining that a multi-state entity has incorrectly decided a question of reserve capacity under the system agreement will frustrate the purposes of the Act.

Only FERC can fairly resolve the question of how the benefits and burdens should be shared among companies doing business in different states. It can both avoid trapped costs and protect overall system reliability. In usurping FERC's authority, the LPSC is interfering with the interests of other states, which are protected under the federal scheme. This Court has noted, the "production and transmission of energy is an activity particularly likely to affect more than one State, and its effect on interstate commerce is often significant enough that uncontrolled regulation by the States can patently interfere with broader national interests." *Arkansas Electric Coop.*, 461 U.S. at 377. By refusing to give effect to allocation decisions made by a multi-state holding company pursuant to a filed tariff, and subject to FERC review, the LPSC has acted in derogation of the federal scheme, as established by *MP&L* and *Nantahala*.

II. THE COURT SHOULD DRAW A BRIGHT LINE WITH RESPECT TO TARIFFS GOVERNING MULTI-STATE ENTITIES

This Court should draw a clear line establishing exclusive federal jurisdiction over the interpretation of multi-state system agreements. The Court has found that Congress intended that approach with respect to other aspects of FERC jurisdiction under the FPA. *See FPC v. Southern California Edison Co.*, 376 U.S. 205, 215-16 (1964) ("Congress meant to draw a bright line easily ascertained, between state and federal jurisdiction, making unnecessary . . . case-by-case analysis."); *see also Nantahala*, 476 U.S. at 966. A bright line approach to tariffs governing multi-state entities is particularly important because of the increasingly central role of regional entities in the industry.

A. FERC's Regionalization Plan Will Fail If States Can Review FERC Tariffs And Deny Cost Recovery

As explained above, FERC is now aggressively moving utilities into RTOs – independently managed regional entities consisting of unaffiliated transmission-owning utilities bound together by a contract filed with FERC. In addition, FERC is proposing that, within a fixed period of time, all RTOs implement a standard market design for wholesale power and transmission services. Starting with Order No. 888, the industry has already invested more than $100 billion in regionalization.[15]

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[15] Energy Security Analysis, Inc., *Impact of the Creation of a Single MISO-PJM-SPP Power Market,* at 8 (July 2002), *available at* www.miso-pjm-spp.com/information/general_documents/study_final_july 29.pdf.

The RTO agreements are enormously complex and could be vulnerable to different interpretations by states. Their provisions for allocating benefits and burdens among utility members are not like the traditional tariff, which fixes a price in an absolute number. Rather, the agreements assign responsibility for certain decisions to the RTO's independent management. As in this case (see Pet. App. 157-58a), an RTO decision may be guided by criteria set forth in the agreement filed at FERC that allow for discretion in its execution. In fact, FERC requires an RTO to be independent of all market participants so that it can exercise such discretion without undue influence from any party or industry sector. *See* 18 C.F.R. § 35.34(j)(1)(iii). Accordingly, state regulators may reach differing conclusions as to the intended meaning of an agreement, and whether the RTO has complied with it.

Disagreements of this kind among states could have serious financial implications for the industry. Under system agreements filed with FERC, utilities are incurring hundreds of millions of dollars in expenses to establish RTOs and putting billions of dollars in assets under their supervision. Implementation of FERC's proposed standard market design ("SMD") will require additional expenses to establish and operate uniform wholesale markets. One utility has estimated that implementation of SMD in the southeast region would cost an additional $55 to $60 million.[16] Annual RTO operating costs have been projected to range from $75

[16] Charles River Associates, *The Benefits and Costs of Regional Transmission Organizations and Standard Market Design in the Southeast*, at 22 (Nov. 6, 2002), *available at* www.crai.com/pubs/pub_2901.pdf.

million to $100 million annually per RTO[17] and are already significantly higher for at least one existing RTO. *See* note 9, *supra*. These costs will likely increase under the SMD rulemaking because the RTO would have additional market design and oversight responsibilities.

Under the LPSC's theory, however, any of these expenditures might be disallowed by an individual state as imprudent, even though undertaken pursuant to the decision of the independent RTO management under the RTO's system agreement. Some states have already objected to SMD on the ground that it will raise retail costs and have requested that SMD not be implemented at this time.[18] Thus, expenditures for RTO operations and SMD implementation could easily become trapped costs, even though mandated under FERC tariffs.

Similarly, a core purpose of FERC's RTO concept and the SMD is to encourage capital investment in upgrades to the transmission grid. Investment in transmission assets has lagged during the past decade, while demand for electricity

[17] *See, e.g.*, Tabors Caramanis & Associates, *RTO West/Benefit Cost Study, Final Report Presented to RTO West Filing Utilities* at ix (Mar. 11, 2002), *available at* www.ksg.harvard.edu/hepg/papers/tabors%20ca%20bencost_031102_rtowestbcfinalrevised/pdf.

[18] *See, e.g.*, Letter of Connecticut Att. Gen. to FERC (Feb. 3, 2002) ("the implementation of SMD will merely raise the price of electricity in the State"); Letter of Massachusetts Attorney General to ISO New England CEO (Feb. 4, 2003) (criticizing FERC's SMD concept as likely to raise wholesale costs). Both letters are available at www.iso-ne.com/iso_news/correspondence_with_public_officials.

has exploded.[19] In a growing number of areas, the transmission lines are carrying all the power they can.[20] Thus, the RTOs are expected to implement regional transmission expansion plans and require that member utilities invest billions in upgrades to the grid. One study showed that between $10 and $30 billion will be required just to bring transmission in the western United States back to a stable condition.[21] The necessary investment in transmission will not occur, however, if individual state regulators retain the right to second-guess RTO plans or the RTO's rates for the recovery of transmission upgrade costs by claiming inconsistency with the RTO system agreement.

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[19] *See Impact of the Creation of a Single MISO-PJM-SPP Power Market*, *supra* at 17-18; *National Transmission Grid Study* at 7, U.S. Department of Energy (May 2002); *Electricity Competition and the Need for Expanded Transmission Facilities to Benefit Consumers*, *supra* at 9-11; Robert W. Gee, *Expanding Our Electric Transmission Network: Consumers Have an Interest at Stake*, prepared for EEI (Sept. 2001), *available at* eei.org/issues/news/transmission_consumers_pdf; Robert W. Gale, *The Case For New Electricity Transmission and Siting New Transmission Lines*, prepared for EEI (Sept. 2001), *available at* www.eei.org/issues/news/transmission_case.pdf.

[20] For example, "in 1995, there were 25,000 transactions where electricity was sold from one region to another. [By 2000], the number hit 2 million." Fred Bayles, "California Readies for Blackouts," USA Today, Aug. 1, 2000.

[21] *See* Carl R. Danner, *The Western Transmission Grid: The Urgent Call for Investment* at 8, prepared for EEI (Sept. 2001), *available at* www.eei.org/issues/news/Transmission_Western.pdf. *See also* Hirst and Kirby, *Transmission Planning and the Need for New Capacity*, U.S. Department of Energy, National Transmission Grid Study: Issue Papers, at D-1 (May 2002) (estimating $56 billion needed for grid in the U.S. over next decade).

State regulators may also dispute the level of costs assigned to utilities in their states under the RTO's transmission service and wholesale sales tariffs. Under FERC's scheme, the RTO is operated under a "one stop shopping" approach – customers go to a single entity, the RTO, through which they can secure all the necessary rights to use the transmission grid in the region. The RTO collects the revenues from customers of these services at the FERC-regulated tariff rates. If retail regulators conclude that utilities in their states either overpaid for services acquired under the RTO tariffs or did not receive sufficient revenue from the RTO for the use of their facilities, they may not permit the utilities to be made whole for the costs they have incurred. As a result, the utilities will have trapped costs and will not recover for the services they supply at the retail level.

Plainly, the new FERC regime could not survive if utilities were subject to challenges in recovering some or all of these costs at the retail level. As recent events in California illustrate, when a utility's wholesale costs are "trapped" by state retail regulators, the utility suffers immediate financial repercussions. Its cash flow is disrupted, and its ability to finance capital improvements and make needed purchases of power is diminished. The adverse effects of such financial distress are felt by the utility's customers. Here, the entire new regional regulatory regime being created by FERC makes huge sums of money subject to decisions by regional entities operating under FERC's jurisdiction. Unless the states adhere strictly to the requirements of *MP&L* and *Nantahala* regarding trapping, this regime will fall apart.

B. *Pike County* Is Inapplicable Because There Is No Choice Involved

The LPSC claims that its actions are justified by an exception to the filed rate doctrine made by the Pennsylvania

state court in *Pike County Light & Power Co. v. Pennsylvania Pub. Util. Comm'n*, 465 A.2d 735, 737-38 (Pa. Commw. Ct. 1983). There, the Pennsylvania Commission had disallowed a portion of Pike County's purchased power expense, on the ground that Pike County could have purchased the power from an alternative supplier more cheaply. *Nantahala*, 476 U.S. at 972-73. Thus, the essence of the *Pike County* inquiry is whether the retail utility made a wise choice in entering into the transaction.

However, this element of choice does not exist for subsidiaries in holding companies or participants in RTOs because the individual utility lacks autonomy to make decisions regarding issues that affect the entity as a whole. FERC and the courts have consistently refused to apply *Pike County* in these circumstances. For example, FERC has refused to apply *Pike County* in the holding company context because the utility had no choice to buy power from other sources. *AEP Generating Co.*, 39 FERC (CCH) ¶ 61,158 at 61,630 (1987). Since the holding company decided the manner in which power would be allocated among its affiliates, those affiliates had no option to purchase power elsewhere. "Because the essence of the *Pike County* inquiry is whether a particular choice was wise, the lack of choice here makes such inquiry an empty one." *See id.* at 61,630. As a result, FERC held, the prudence of those purchases was within the exclusive jurisdiction of the FERC. The Fourth Circuit affirmed. *Appalachian Power Co. v. Public Serv. Comm'n*, 812 F.2d 898, 903 (4th Cir. 1987).[22]

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[22] Other courts have consistently held that *Pike County* is inapplicable when the utility has no choice. *See, e.g., Kentucky W. Va. Gas Co. v. Pennsylvania Pub. Util. Comm'n*, 862 F.2d 69, 74 (3d Cir. 1988); *Gulf States Utils. Co. v. Public Util. Comm'n*, 841 S.W.2d 459, 469 (Tex.App.--Austin 1992, writ denied); *City of*

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This reasoning applies with even greater force in the RTO context. By FERC regulation, RTOs must be managed independently of the member utilities. Order No. 2000, at 31,063; 18 C.F.R. § 35.34(j)(1)(iii). Although the individual utilities serve customers in different states, they are without authority to modify or refuse to pay charges incurred pursuant to RTO tariffs or required as a result of RTO decisions or instructions. Under the FERC-filed tariff, once the RTO has made a decision, the member companies have no authority to change any of its terms. Thus, the *Pike County* exception would not apply to RTOs.

C. State Regulatory Complaints About The Administration Of Tariffs Filed By Multi-State Entities Should Be Brought Before The FERC

The LPSC recognizes that, in the end, FERC must resolve any disputes between state regulators about the meaning of multi-state system agreements. *See Cert.* Opp. at 21 ("[I]t is true that FERC is in the best position to make power and cost allocations that involve conflicting state interests."). Thus, the LPSC recognizes that FERC's interpretation, when provided, is authoritative. However it believes the states ought to be free to assert jurisdiction any time up until FERC acts. (Pet. App. 65a, 72a). Such a scheme would obviously frustrate implementation of the statute. The individual utility would be denied recovery of costs incurred under the filed rate at FERC and would be in the position of having to go back to FERC for a decision, and then obtain retroactive rate relief from the state agency after FERC acts.

Chicago v. Illinois Commerce Comm'n, 150 N.E.2d 776, 777, 780-81 (Il. 1958). *See generally Nantahala*, 476 U.S. at 972-73.

In the context of the Federal Power Act, this Court has never countenanced this kind of "wait for a conflict" procedure. It has always found Congress' grant of jurisdiction to be exclusive. In *Arkansas Louisiana Gas Co.*, 453 U.S. at 579, the Court held that a state could not assume a hypothetical rate different from that filed with FERC. In *Schneidewind v. ANR Pipeline Co.*, the Court held that the simple fact that there was an "imminent possibility" that the state action at issue would conflict with FERC jurisdiction supported a finding of preemption. 485 U.S. 293, 310 (1988). Likewise, in *MP&L*, the Court held that the Mississippi Supreme Court "erred in adopting the view that the pre-emptive effect of FERC jurisdiction turned on whether a particular matter was actually determined in the FERC proceedings." 487 U.S. at 374. "The only appropriate forum for such a challenge is before the Commission or a court reviewing the Commission's order." *Id.* at 375; *id.* at 379 (Scalia, J., concurring) (failing to seek FERC ruling "does not take the issue out of FERC's jurisdiction and recommit it to the States"). *See also Nantahala*, 476 U.S. at 970. As these cases recognize, it "is common ground that if FERC has jurisdiction over a subject, the States cannot have jurisdiction over the same subject." *MP&L*, 487 U.S. at 377 (Scalia, J., concurring).

The only case cited by the LPSC for its view at the *certiorari* stage is distinguishable. *See Pan American Petroleum Corp. v. Superior Court of Del.*, 366 U.S. 656 (1961). That was a breach of contract action between two private parties. FERC had already declared what was the just and reasonable rate; thus, the state court was simply enforcing the rate set by FERC. That case does not support the proposition that a state can get out in front of FERC to decide the meaning of a FERC tariff and whether a violation has occurred.

The LPSC's position is not even feasible from a practical point of view. The LPSC would require the parties to engage in extensive litigation, all for naught. They would need to litigate before one or more state commissions until their efforts produced a conflict causing FERC intervention. Then the effects of the state litigation would need to be undone, perhaps retroactively. All this litigation would be a pointless waste of time, effort, and public resources.

It is no answer that concerned utilities can take questions about multi-state operating agreements to FERC. *See Cert.* Opp. at 21 ("Entergy could have asked the FERC for a declaration that compliance did not really require considering the matters set out in the tariff."). The utility would not know until the state commission's decision is issued that costs under the filed rate are being disallowed. To protect itself, the utility would have to file a declaratory action at FERC any time a state commission begins to investigate whether a violation has occurred. Moreover, it is unclear whether utilities would be able to recoup costs previously disallowed by the state commissions retroactively. Most utility rate regulatory regimes include rules prohibiting retroactive ratemaking.[23] Thus, a utility would have strong reasons to file a preemptive action with FERC to head off any state investigation.

Whereas placing the burden on the utility to seek anticipatory declaratory relief at FERC could swamp this already overburdened agency with much unnecessary litigation, the states are in a good position to judge when their

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[23] *See, e.g.*, La. R. S. § 45:1163.1; *Ford Motor Co. v. Michigan Pub. Serv. Comm'n*, 562 N.W.2d 224, 230 (Mich. App. 1997); *State v. Pub. Util. Comm'n*, 883 S.W.2d 190, 198-99 (Tex. 1994); *Wisconsin Power & Light Co. v. Pub. Serv. Comm'n*, 511 N.W.2d 291, 294 (Wisc. 1994).

complaints about the administration of a multi-state system agreement warrant a full federal proceeding. Congress contemplated that states would bring their complaints about federal tariffs to a neutral federal forum. For example, the states may file complaints about inter-utility activities (16 U.S.C. § 825e), and these complaints may ultimately result in FERC action declaring rates, practices and contracts unjust and unreasonable and establishing new ones (16 U.S.C. §§ 824e(a), 824d(e)). The states may also seek review of Commission orders in the federal courts (16 U.S.C. § 825*l*). FERC routinely handles complaints initiated by state utility commission, including ones filed by the LPSC.[24] Thus, states dissatisfied with conduct pursuant to a FERC-filed tariff of a multi-state entity may seek a determination from FERC that the tariff has been violated. What the states are precluded from doing, however, is making their own determinations that a multi-state entity has acted inconsistently with the terms of a federally filed tariff.

[24] *See, e.g., Louisiana Public Service Commission v. Entergy*, 102 FERC (CCH) ¶ 63,008 (2003); *Entergy Servs.*, 80 FERC ¶61,197 (1997). In the 1997 FERC proceedings that amended the tariff at issue here, FERC said that "'the regulations of the Commission provide a remedy for any'" violation of the amended tariff. *See Entergy Servs.*, 80 FERC at 61,789 & n. 50 (quoting Administrative Law Judge).

CONCLUSION

The judgment of the Louisiana Supreme Court should be reversed.

Respectfully submitted,

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March 3, 2003